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In the Supreme Court of the United States

No. 77-118

PACIFIC ENGINEERING & PRODUCTION CO. OF NEVADA,
Petitioner,

vs.

KERR-McGEE CORPORATION AND
KERR-McGEE CHEMICAL CORPORATION,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals For the Tenth Circuit

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Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals For the Tenth Circuit

Petitioner Pacific Engineering & Production Co. of Nevada prays that a writ of certiorari issue to review the judgment entered on February 16, 1977, by the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals appears in Appendix A to this Petition. It has not yet been officially reported (No. 76-1238). The liability and damage opinions of the District Court (the Honorable Walter E. Hoffman, Eastern District of Virginia, sitting by special designation) appear in Appendices B and C to this Petition. They are reported in 1974-1 Trade Cases ¶ 75,054, pp. 96,721-51, and 1976-1 Trade Cases ¶ 60,724, pp. 68,102-16, and ¶ 60,737, pp. 68,166-68.

JURISDICTION

The opinion of the Court of Appeals was filed on February 16, 1977. The Court of Appeals' Order denying Petitioner's timely Petition for Rehearing was entered April 25, 1977. This Court has jurisdiction under 28 U.S.C. § 1254(1). The District Court had original jurisdiction under 15 U.S.C. § 15.

QUESTIONS PRESENTED

1. It is uncontroverted that Respondent in this case possessed actual monopoly power—annual shares of the market that ranged between 67 and 88 percent, plus power to control price and to exclude competition. Under these circumstances:

(a) Must the plaintiff also prove the same specific predatory intent required by the Court of Appeals for attempted monopolization cases in order to establish a violation of Section 2 of the Sherman Act? Is not the requisite intent, as clearly held by Judge Learned Hand in the *Alcoa* case[1] inferrable from the existence of such uncontroverted monopoly power, coupled simply with the intent to maintain such power and position, however "innocently" Respondent may have proceeded so to do?

(b) Does Section 2 of the Sherman Act allow, as permitted by the Court of Appeals both in this case and in the *Telex* case[2] the holder of undisputed monopoly power to engage in the same range of activity actually or potentially harmful to its only competitor as is permitted a firm that does not have such power? Specifically, is not an actual monopolist prohibited from engaging over a seven-year period in below-cost pricing and other overt acts for the specific purpose, as admitted by the Court of Appeals, of driving its sole competitor out of business?

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1. *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. [certified to the Second Circuit by the Supreme Court pursuant to 15 U.S.C. § 29] 1945).

2. *Telex Corp. v. International Business Mach. Corp.*, 510 F.2d 894 (10th Cir. 1975), *cert. dismissed* (petition withdrawn), 423 U.S. 802.

2. The District Court in this case found that Respondent had the specific intent to destroy competition or create a monopoly. The Court of Appeals did not reject this finding as clearly erroneous, but found that Respondent's overt acts were not in themselves "predatory" or "sinister." The second question presented, therefore, is whether, in proving the intent component of an attempt to monopolize, the plaintiff must show something in addition to specific intent to destroy competition or create a monopoly, such as "predatory" or "sinister" conduct.

3. The District Court found that Respondent's sales over a seven-year period were far below cost, and were fixed with the specific intent of driving Petitioner out of existence. The Court of Appeals accepted the finding of sustained below-cost sales and the finding of Respondent's specific intent, but held that Respondent's prices were nevertheless lawful because they were above its marginal or average variable cost. The third question presented is whether "cost" for purposes of below-cost sales—in both attempted monopoly and price discrimination cases—is limited to marginal cost, even where the relevant time period is a long-run period, in this case seven years, or whether "cost" is actual fully-allocated cost, as suggested by this Court in the *Utah Pie* case.[3]

STATUTES INVOLVED

Section 2 of the Sherman Act, 15 U.S.C. § 2, provides, in relevant part:

> Every person who shall monopolize, or attempt to monopolize . . . shall be deemed guilty of a misdemeanor . . . .

Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a), provides, in relevant part:

> It shall be unlawful for any person . . . to discriminate in price between different purchasers of commodities of like

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3. *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967), *rehearing denied*, 387 U.S. 949.

> grade and quality, . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce . . . .

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

A. Introductory Statement.

Cases arising under Section 2 of the Sherman Act are not numerous, but are essential to the implementation of federal antitrust policy. The holding of the Court of Appeals in this case is of rare significance because it imposes an enormous and unprecedented magnification of the plaintiff's burden in monopoly and attempted monopoly cases. That holding, moreover, adds serious conflicts among the Circuits to the existing confusion surrounding standards of intent in attempted monopoly cases.

The learned and long-experienced trial judge dealt with a case that was pending for six years between filing and judgment, with a record aggregating in excess of 2,700 exhibits, trial testimony aggregating over 3,000 pages, and the deposition testimony of some 32 witnesses. In 1974, almost a full year after the close of the record on the liability trial, the trial judge issued a 76-page opinion, containing his findings of fact and conclusions of law, and certified the case for interlocutory appeal. The Court of Appeals declined the interlocutory appeal. In 1976, again almost a full year following the damage trial, the trial judge issued a 36-page opinion, containing his findings of fact and conclusions of law.

The trial judge found that Respondent had unlawfully monopolized and attempted to monopolize the ammonium perchlorate market, and had sold ammonium perchlorate in violation of the Robinson-Patman Act. Damages awarded, after trebling, were $4,590,594, together with attorneys' fees of $528,500 and taxable costs.

The Court of Appeals correctly appraised Judge Hoffman's meticulous and extensive opinions as "commendably thorough and exact as to the basic facts." (Appendix A, p. 2.)

The District Court's holdings that Respondent was guilty of both actual monopolization and attempted monopoly were based on the District Court's findings that:

> (1) During the years 1967 through 1970, the annual shares of the relevant market in the possession of Respondent ranged between 67 percent and 88 percent. (Appendix B, p. 38). The District Court also found that Respondent had the power to control the price; that in light of the finding of power to control the price there was no need to ascertain power to exclude competition; but that "if we were to decide this issue . . . we would rule that the defendant [Respondent] had this power." (Appendix B, p. 65.)
>
> (2) Respondent had "the specific intent to destroy competition or create a monopoly, [and] took overt acts pursuant to this intent, and that a dangerous probability of monopoly existed." (Appendix B, p. 59.)

None of these findings was rejected by the Court of Appeals as clearly erroneous. Indeed, the Court of Appeals characterized Judge Hoffman's findings as "commendably thorough and exact as to the basic facts." (Appendix A, p. 2.) Thus, the necessary effect of the Court of Appeals' holding is to expand the plaintiff's burden in Section 2 cases far beyond the holdings of any previous case. The effect of that holding is that:

> (1) In actual monopolization cases, the plaintiff must prove not only actual monopoly power but also the same

intent and conduct required by the Court of Appeals in attempted monopoly cases;

(2) In cases of attempted monopolization (and, it follows actual monopolization), the plaintiff must establish facts beyond proof of specific intent to destroy competition or create a monopoly—the plaintiff must prove "predatory" or "sinister" conduct.

The District Court also found that Respondent violated the Robinson-Patman Act by contemporaneous sales of ammonium perchlorate of like grade and quality to different purchasers at discriminatory prices. The Court of Appeals did not reject any part of this finding. It reversed the Robinson-Patman adjudication on the ground that predatory conduct had not been proven. It rejected without comment the District Court's finding that Respondent's discriminatory pricing had itself directly lessened competition and tended to monopoly. The District Court had based this finding on its adjudication of actual monopolization, a result the District Court found to have been achieved, in part, by Respondent's discriminatory pricing.

The effect of the Court of Appeals' Robinson-Patman holding therefore is to add a new element to the plaintiff's burden in a Robinson-Patman case, the requirement of proof of predatory conduct *in addition* to an actual finding of tendency to monopoly, notwithstanding the total absence in the Robinson-Patman Act of any such requirement.

B. Description of the Industry, the Parties, and the General Economic Facts.

The District Court found (and the Court of Appeals did not disagree) that the relevant product market in this Section 2 case is all ammonium perchlorate ("A/P") and the relevant geographic market, the entire United States.

A/P is one of the three major ingredients, and by weight and volume the principal ingredient, of solid rocket propellants. Its use as a rocket fuel oxidizer constitutes virtually the entire national market for A/P. Prior to 1958, Respondent[4] was the sole manufacturer of A/P in the United States. It had a complete monopoly. In 1958, two large firms (Hooker Chemical Company and Pennsalt Chemical Corporation) and one small firm (Petitioner) entered the market in competition with Respondent. In the period 1954-1957, when Respondent was the only producer, the price of A/P was above $.40 a pound. As competition eroded this monopoly price, Pennsalt by 1965 (the name later changed to Pennwalt) and Hooker by 1966 shut down their plants and left the market. In 1965, and during the following seven-year period, Respondent—faced with competition only from a small, one-product company—first reduced its A/P price to $.15 per pound, and then maintained the price in the $.15-$.20 range, with almost all competitive sales being below $.185 per pound, substantially below its cost. (Appendix B, p. 35.)

In 1965, when Respondent fixed the $.15 per pound price, it had net sales of over $55,000,000, and net income before taxes of nearly $9,000,000. (J A 2559.[5]) In the same year, Petitioner had net sales of $1,307,296 and a net operating loss of $535,613. (J A 2562.) In 1970, the final year of the damage period, Respondent enjoyed net sales of over $527,000,000 and net income before taxes of over $47,000,000. (P X 1086.[6]) In that year

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4. Both Respondents are referred to collectively as "Respondent." Prior to 1958, American Potash & Chemical Corporation was the sole supplier of A/P. In 1967, it was merged into and with Respondent Kerr-McGee Corporation, which has since conducted the business through a wholly-owned subsidiary, at first named "Ampot, Inc.," later named "American Potash & Chemical Corporation," and now named "Kerr-McGee Chemical Corporation."

5. "J A" refers to the Joint Appendix comprising the record before the Court of Appeals. The Joint Appendix consists of 26 printed volumes, comprising 5,059 pages.

6. "P X" refers to Plaintiff's Exhibits received in evidence.

Petitioner had net sales of $1,005,071 and a net operating loss of $526,815. (J A 2562.) At the time of the liability trial, Respondent was one of the 250 to 300 largest business enterprises in the entire nation, with book assets exceeding $800,000,000. (J A 1219.)

Respondent itself suffered large losses in its A/P operations ($458,092 in 1965; $362,131 in 1966; $210,676 in 1967; $328,625 in 1968; and $247,560 in 1969)—a total of $1,607,084 in five years. Nevertheless, because of its unique ability as a multi-product supplier to the Government of products subject to the Renegotiation Act, Respondent in fact lost nothing. Unlike Petitioner, Respondent was able to subsidize its A/P losses from its below-cost sales directly from other profitable Government business. This ability resulted from the regulations of the Renegotiation Board then in effect that based allowable (renegotiable) profits on the aggregate results of operations relative to all Government business. (*E.g.*, PX 1076-1082, J A 3194-3291 [Respondent's Renegotiation Reports for 1965-1971].) This special capacity to subsidize A/P losses directly from other profitable Government business emphasizes dramatically the differences in size and financial muscle between Petitioner and Respondent. Small wonder that Judge Hoffman found that Respondent's below-cost pricing was aimed directly at Petitioner's very existence. Even in reversing Judge Hoffman's result, *the Court of Appeals itself concluded that Respondent possessed "an intent that its pricing succeed in excluding [Petitioner] from the market . . . ."* (Appendix A, p. 11; emphasis added.)

C. The Decisions Below.

The District Court had jurisdiction in this private antitrust case by reason of Section 4 of the Clayton Act, 15 U.S.C. § 15.

1. THE TRIAL COURT'S FINDINGS.

Judge Hoffman found that Respondent's variable cost was $.12 to $.14 per pound. (Appendix C, p. 105.) If other usual and

actual costs such as taxes, insurance, management expense, sales costs, interest, overhead, depreciation, and general and administrative costs were included, however, the cost was between $.1932 and $.2937 per pound. (Appendix B, p. 35.) The District Court held that throughout the "damage period," Respondent had the power to control the price of A/P and that it could have raised the price. (Appendix B, p. 64.) Instead of raising the price, which would have maximized its profits even though it would have lost some of its volume (Appendix C, pp. 102, 106), Respondent, as held by the District Court, with "predatory intent," and "specific intent" to drive Petitioner out of business (Appendix B, p. 60) adopted and for over seven years maintained a price barely above the cost of materials and labor alone. (Appendix B, pp. 33-34.)

There is no doubt that Respondent's principal executives—its president and its four operating vice presidents—knew full well and calculated their pricing policy on the expectation of forcing Petitioner out of business, and precluding market entry or reentry by other potential competitors. In one of those remarkable documents that occasionally surfaces in aggravated antitrust cases, a June 1965 memorandum from D. C. Cable, Respondent's special financial analyst, to Respondent's executives, the writer recommended raising the A/P price from $.165 per pound to a level at which both Petitioner and Respondent could make a reasonable profit. Cable specifically advised his superiors that they ought to reconcile themselves to sharing the market with Petitioner, and cease pricing A/P on "the expectation of forcing [Petitioner] to shut down." (PX 44, J A 2411; Appendix B, pp. 35-37; Appendix A, pp. 5-6.) Cable added, however, that the higher price should not be so high as to encourage market entry by others. Cable's superiors disregarded his sound advice, and cut the price to $.15 per pound, which resulted in a net loss of $.134 per pound on the major sale then

under consideration. (Appendix B, p. 36.) As Judge Hoffman observed, the Cable memo is "Perhaps the clearest evidence that [Respondent] set its pricing policies with full knowledge that its price was below cost * * * [and] that officials of [Respondent] were aware that [Petitioner] was facing bankruptcy if the price of A/P remained below cost." (Appendix B, pp. 35-37.)

Judge Hoffman squarely held that Respondent monopolized the A/P market. (Appendix B, p. 65.) Although Petitioner and Respondent had approximately equal shares of the market in 1964, Respondent's pricing increased its market share to as high as 88 percent in 1968. Indeed, the Court of Appeals made essentially the same finding:

> "In the face of this knowledge, [Respondent] continued its low prices. In 1968, [Respondent] was bidding two to three cents a pound below [Petitioner]. [Respondent's] market share is indicative of the degree of its success in foreclosing [Petitioner] from the market.

Year	Percentage
1966	53.5
1967	80.0
1968	88.0
1969	67.0
1970	78.0

Appendix A, p. 6.

Both Judge Hoffman and the Court of Appeals agreed that Respondent selected and priced A/P at these levels knowing *and intending* that Petitioner, a small one-product company, could not survive at those prices. (Appendix A, pp. 5, 11.) Stated plainly, Respondent, an extremely large, diversified corporation, could and did directly make up its A/P losses from profits on other products—indeed directly on other renegotiable Government business—as well as from the profits of A/P sold at discriminatory prices to customers for whose business Peti-

tioner had only nominal penetration. Thus, to customers for whose business there was intense direct competition between Petitioner and Respondent, Respondent's price was in the range of $.15 per pound. To customers where such competition was lacking, it charged contemporaneously as high as $.325 per pound. (Appendix B, p. 74.)

The District Court further found, and the Court of Appeals did not disagree, that Respondent undertook "unreasonable" surveillance of Petitioner (Appendix B, pp. 38-40), and used the results to select pricing policies which would destroy Petitioner. Indeed, Respondent even made computations, based on information available to it from its surveillance, as to how long Petitioner could survive at Respondent's below-cost prices, and selected its pricing policy accordingly. When Respondent computed that Petitioner would expire, Respondent's quotations to customers for sales thereafter were much higher. When Petitioner did not bankrupt on schedule, or its circumstances changed favorably, Respondent lowered its forward prices. (Appendix B, pp. 42-45, 61.)

After Petitioner had not won a single bid for almost two years, it finally secured a major contract at $.1794 per pound from United Technology Corporation. This contract alone was expected to keep Petitioner in business for a substantial period of time. Defendant thereupon sent its Vice President J.C. Shumacher and its A/P Product Manager to see the President of UTC. Shumacher told UTC's President that Respondent had a large "surplus" of A/P that it was willing to sell at $.09 to $.10 per pound (far below the cost of materials and labor alone). The amount to be offered at this price was in excess of one year's supply to UTC. The obvious reason for this remarkable proposition was to take away what little business Petitioner would have. At the time of this attempted "dumping" Respondent had 88 percent of the market. Had the dumping been successful, Respondent would

have had 98 percent of the market. UTC, however, investigated and found that no surplus existed as was asserted, and rejected Respondent's unsavory offer. (Appendix B, pp. 40-42, 62.)

The District Court also found, and the Court of Appeals did not disagree, that Respondent made sales forecasts predicting it would obtain *all* A/P business (Appendix B, pp. 31-33, 62), and that Respondent acted to impair Petitioner's status as a small business, entitling it to "set-asides" on some procurements and to favorable financing (Appendix B, pp. 42, 61), a behavior found by Judge Hoffman to be "symbolic of [Respondent's] efforts to drive [Petitioner] from the market." (Appendix B, p. 61.)

Judge Hoffman, based on the above facts and numerous others outlined in his opinions, and not contested by the Court of Appeals, found that Respondent priced A/P at the foregoing prices for the purpose of driving Petitioner out of business so that Respondent would regain its 100 percent monopoly and be able to sell A/P at monopoly prices. (Appendix C, p. 99.) The District Court found that Respondent's market percentages of 80, 88, 67 and 78 percent during the years 1967 to 1970 were monopolistic. The Court of Appeals did not contest any of the findings related in this paragraph.

2. THE COURT OF APPEALS' CONCLUSIONS.

The following summarizes the conclusions reached by the Court of Appeals in reversing Judge Hoffman's judgments of liability and damages.

1. Respondent's pricing practices were lawful, even though for a long-run period of seven years far below full cost and at or just above marginal cost, and even though set, without any computation of marginal cost at the time, with knowledge and intent that those prices would drive Petitioner out of business.

2. "The other practices employed by [Respondent] inflicted no independent harm," and *"indicate nothing more than an*

intent that [Respondent's] pricing succeed in excluding [Petitioner] from the market." (Appendix A, p. 11; emphasis added.)

3. The Court of Appeals reversed Judge Hoffman's adjudication of actual monopolization. This was done without reference to the District Court's findings of Respondent's monopoly power to control price and to exclude competition, and without reference to Respondent's monopolistic market shares. The Court of Appeals thus explicitly held that the same standards of intent or conduct must be satisfied to establish a case of actual monopolization as to establish a case of attempted monopoly.

4. The Court of Appeals reversed Judge Hoffman's adjudication of attempted monopoly. It did so because of the absence of sales below marginal cost, which the Court of Appeals evidently would have considered predatory conduct. It did so without reference to the "clearly erroneous" standard governing appellate review of trial court factual findings, and without regard for the particular appropriateness of this standard on such issues as intent.

5. The Court of Appeals reversed the District Court's determination that Respondent violated the Robinson-Patman Act, holding that its admittedly discriminatory pricing caused no competitive injury, because, again, the Court of Appeals found no predatory conduct.

REASONS FOR GRANTING THE WRIT

The Petitioner in *Telex Corp v. International Business Mach. Corp.*, 510 F.2d 894 (10th Cir. 1975), *cert. dismissed* (petition withdrawn), 423 U.S. 802, stated accurately the gravity of the novel direction taken by the Tenth Circuit both in *Telex* and in this case:

> Supremely at stake are the whole meaning and future of the national effort to control monopolization and attempts

> to monopolize, with the heretofore unbroken course of the law not only blocked but rolled back by the decision below. (Petition for Writ of Certiorari, p.26.)

The opinion of the Court of Appeals should be reviewed, and the three questions presented considered by this Court, for reasons that are distinct as to each question.

1. The Writ Should Be Granted to Correct the Erroneous Rulings That Even Where Actual Monopolization Has Been Established, the Same Intent or Conduct Must Be Proven as in Attempted Monopoly Cases, and That Respondent Could Lawfully Plan and Execute Its Scheme to Price Petitioner Out of Existence.

This case is first and foremost a monopolization case. The attempt claim is obviously unnecessary if the monopolization adjudications of the trial court are sustained.

The Court of Appeals correctly notes at the outset of its opinion that the elements of a monopolization case are (1) the possession of monopoly power in a relevant market, and (2) willful acquisition or maintenance of that monopoly power. (Appendix A, p. 2.) The Court of Appeals accepts the District Court's findings as to relevant market and Respondent's monopoly market shares of up to 88 percent. (Appendix A, p. 6.) Read in its entirety, the Court of Appeals' opinion implicitly approves the District Court's additional specific findings that Respondent possessed monopoly power to control prices and to exclude competition.

The Court of Appeals therefore acknowledges that this is a case in which Respondent possessed monopoly power in a properly-defined market. Only one ingredient remains to establish the offense of monopolization, the requisite intent to monopolize—whether Respondent's monopoly power was willfully acquired or maintained.

A. THE COURT OF APPEALS HAS INCORRECTLY APPLIED THE SAME STANDARD OF INTENT IN A MONOPOLIZATION AS IN AN ATTEMPTED MONOPOLY CASE.

The Court of Appeals does not separately address the intent issues as to the monopolization claims and the attempt claims, but from the outset *incorrectly* states Petitioner's claims and the District Court's finding. To the reader's amazement, the Court of Appeals flatly declares the issue of intent on both claims to be the same:

> The distinctions between the two offenses are not relevant to our decision, because the same conduct was relied upon to establish both the attempt and the willful maintenance of the monopoly. The fundamental issue is whether [Respondent] engaged in predatory price cutting. (Appendix A, pp. 2-3.)

The Court of Appeals thereafter proceeds with an analysis of intent that never distinguishes between the monopolization and attempt claims, and concludes that mixed discussion by holding:

> There is nothing in the record to warrant a finding that [Respondent] engaged in predatory pricing. (Appendix A, p. 15.)

Thus, the Court of Appeals squarely holds that the intent requirement for a monopolization offense and an attempt offense are identical, and that both require *predatory conduct,* elsewhere in its opinion characterized as *"sinister."* (Appendix A, p. 11.) It is notable, however, that the Court of Appeals, while it disagreed with the trial court's characterization of Respondent's acts as predatory, did not disagree with its findings as to what the acts were, their effects on competition, or the purpose or intent with which they were performed.

For purposes of the first Question presented, the distinction between specific intent and "predatory" or "sinister"[7] conduct is

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7. The words "predatory" and "sinister" ought not in any event to be of any significance. They are only labels expressing a judgment that the behavior is to be condemned.

not important. The controlling fact is that for the first time in history a Court of Appeals in a monopoly case has imposed an intent requirement beyond general intent even where the defendant has preemptive market shares that are indisputably in the range of monopoly, and even where there are unrejected findings of fact that the defendant had at the same time power to control price and to exclude competition.

Thus, what the Court of Appeals has done is to combine the most burdensome elements of two separate Section 2 offenses: (1) proof of actual monopoly power, and (2) proof of specific intent, or, for reasons discussed below, something more than specific intent.

Every prior decision of which we are aware, of this Court and of the Circuits, recognizes the well-established difference between the specific intent required to establish an unlawful attempt to monopolize and the very different and lower level of proof of intent required in a case of monopolization.

The leading case is Judge Learned Hand's decision in *United States v. Aluminum Co. of America,* 148 F.2d 416 (2d Cir. [certified to the Second Circuit by this Court pursuant to 15 U.S.C. § 29] 1945).[8] Judge Hand's heretofore-accepted analysis regarding the requisite intent in a monopolization case follows:

> In order to fall within § 2, the monopolist must have both the power to monopolize, and the intent to monopolize. To read the passage as demanding any "specific" intent, makes nonsense of it, for no monopolist monopolizes unconscious of what he is doing. So here, "Alcoa" meant to keep, and did keep, that complete and exclusive hold upon the ingot market with which it started. That was to "monopolize" that market, *however innocently it otherwise proceeded.* 148 F.2d at 432; emphasis added.

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8. In the threshold decision, *Swift & Co. v. United States,* 196 U.S. 375, 396 (1905), Mr. Justice Holmes distinguished between the proof of specific intent required in an attempt case and the presumed intent to monopolize that should follow from the finding of monopoly power.

In *United States v. Griffith*, 334 U.S. 100, 105 (1948), this Court approved Judge Hand's analysis in a declaration that, on the facts of the case, is short of a square holding:

> As stated in [Alcoa], "no monopolist monopolizes unconscious of what he is doing." Specific intent in the sense in which the common law used the term is necessary only where the acts fall short of the results condemned by the Act.

The Court reaffirmed this principle in *dicta* in *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 626 (1953):

> While the completed offense of monopolization under § 2 demands only a general intent to do the act, "for no monopolist monopolizes unconscious of what he is doing", a specific intent to destroy competition or build monopoly is essential to guilt for the mere attempt now charged.

This Court has never retreated from or weakened the declarations of these cases, which make clear that there is a great difference between the specific intent required in an attempt case and the general intent that is presumed from the possession of unlawful monopoly power in a monopolization case. See also, applications of the equivalent rule in Section 1 cases, as in *United States v. Paramount Pictures*, 334 U.S. 131, 172-3 (1948), and *United States v. Columbia Steel Co.*, 334 U.S. 495, 524-5 (1948). This Court evidently has not, however, adopted the rule of the *Alcoa* case by a square holding, thus leaving latitude for the division among the Circuits that is created by the decision of the Court of Appeals in *Telex* and in this case.

The Circuits other than the Tenth that have considered the content of the requisite intent to monopolize in an actual monopolization case have, prior to the decision of the Court of Appeals in this case, followed the *Alcoa* case. *Intern. Railways of Cent. America v. United Brands*, 532 F.2d 231, 239 (2d Cir. 1976); *Lewis v. Pennington*, 400 F.2d 806, 811 (6th Cir. 1968); *United States v. Empire Gas Corp.*, 537 F.2d 296, 298-9 (8th Cir. 1976);

Arthur Murray, Inc. v. Reserve Plan, Inc., 406 F.2d 1138, 1145 (8th Cir. 1969); *Treasure Val. Potato Bar. Ass'n. v. Ore-Ida Foods, Inc.*, 497 F.2d 203, 209-10 (9th Cir. 1974).

In *Lewis v. Pennington,* the Sixth Circuit held:

> Unlike the substantive offense of monopolization, where it need be established that a company has monopoly power . . . coupled with a general or deliberate intent to exercise that power . . . , a specific intent to accomplish an unlawful result is necessary where monopoly power has not been obtained and the charge is an attempt or conspiracy to monopolize. 400 F.2d at 811.

In *Empire Gas,* the Eighth Circuit held:

> Specific intent need not be proved when it is alleged and proved that monopolization has been accomplished. 537 F.2d at 299.

In this case, as in *Alcoa,* Respondent "meant to keep, and did keep," that hold upon the market, that share of the market, that power over price, and that power to exclude competition, that it had: "That was to 'monopolize' that market, however innocently [Respondent] otherwise proceeded." 148 F.2d at 432.

B. THE COURT OF APPEALS HAS INCORRECTLY AUTHORIZED THE POSSESSOR OF ADMITTED MONOPOLY POWER TO ENGAGE IN BUSINESS PRACTICES THAT WERE EXCLUSIONARY BOTH IN PURPOSE AND EFFECT, AS IF RESPONDENT DID NOT POSSESS MONOPOLY POWER.

A major reason why the writ should be granted is that the decision below is in clear conflict with Judge Hand's opinion in *Alcoa.* The decision reverses the direction of the law on the subject. Thus there is a *direct conflict* between the Tenth and Second Circuits. But the conflict is more than that. Because there was not a quorum of this Court eligible to sit in *Alcoa,* the Second Circuit decided it under a special grant of jurisdiction and was acting in the capacity of a court of last resort—of this Court itself. A disagreement by any other court of appeals with a decision of that stature commands review by this Court.

Alcoa, and all subsequent decisions until *Telex* and this case have recognized that *monopoly is a condition, a state of affairs,* not limited to a condition produced by acts thought to be "unfair" or "reprehensible." The basic definition of monopoly power is "the power to control prices or exclude competition."

Whether the affirmative acts of the monopolist are neutral or reprehensible, lawful or unlawful if committed by one lacking monopoly power, is totally extraneous. No doubt theoretical arguments can be mustered why it would be better to permit the monopolist to sell at one price or another, perhaps even as here at a price far below his costs, regardless of the effect on competition or even regardless of his purposes, on the theory that thereby the public gains the benefit of low prices. But those are arguments of statecraft, to be addressed to Congress. They are not the philosophy of Section 2 of the Sherman Act. In adopting that Act Congress had no "idea of imposing an economist's model of competition on American Industry" or of enacting standards that change their meaning with every seasonal crop of economic theory. *United States v. Trenton Potteries Co.,* 273 U.S. 392, 397 (1927).

By the time of *Otter Tail Power Co. v. United States,* 410 U.S. 366 (1973), the law, as we submit it to be, was recognized, even by the dissenting justices, as the "familiar Sherman Act formula" under which the unilateral possessor of monopoly power acting to preserve that power is guilty of an antitrust violation. 410 U.S. at 383. What was before the Court in *Otter Tail* was as lawfully acquired a monopoly as can be imagined, a regulated natural monopoly. Yet Otter Tail was held to have violated Section 2 because it refused to sell power to a municipal corporation or to transmit power for it; it "used its monopoly power in the towns in its service area to foreclose competition or gain a competitive advantage, or to destroy a competitor . . . ." 410 U.S. at 377.

Judge Wyzanski in *United States v. United Shoe Machinery Corp.*, 110 F.Supp. 295 (D.Mass. 1953), *aff'd per curiam*, 347 U.S. 521, understood both *Alcoa* and *United States v. Griffith*, 334 U.S. 100 (1948):

> Since Judge Learned Hand's opinion in 1945 . . . and . . . United States v. Griffith . . . that provision of § 2 . . . has been so interpreted as to reach any enterprise that has exercised power to *control* a defined market, if that power is to any substantial extent the result of barriers erected by its own business methods (*even though not predatory, immoral, or restraining trade* in violation of § 1 of the Sherman Act, 15 U.S.C.A. § 1), unless the enterprise shows that the barriers are *exclusively* [emphasis is the court's] the result of superior skill, superior products, natural advantages, technological or economic efficiency, scientific research, *low margins of profit maintained permanently and without discrimination,* legal licenses, or the like. 110 F.Supp. at 297; emphasis added.

So also, on remand of *Alcoa* to the district court, Judge Knox understood its teaching, *United States v. Aluminum Co. of America*, 91 F.Supp. 333 (S.D.N.Y. 1950): ". . . Judge Learned Hand demonstrated that [there was no] requirement of abusive practices in addition to that of monopoly power . . ." (91 F.Supp. at 341), and no requirement that conduct be "predatory." The law had changed "in substantive emphasis from 'abuse' to 'power' . . . ." (91 F.Supp. at 342.) So, later, Professor Turner summed it up: "Alcoa clearly consigned the abuse theory of monopolization to limbo."[9]

Plainly Judge Hand's decision was that under Section 2 it is not necessary to convict the defendant of "practices unlawful in themselves." He added:

> So here, "Alcoa" meant to keep, and did keep, that complete and exclusive hold upon the ingot market with which it

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9. Turner, Antitrust Policy and the Cellophane Case, 70 Harv. L. Rev. 281, 292 (1956).

started. *That was to "monopolize" that market, however innocently it otherwise proceeded.* 148 F.2d at 432; emphasis added.

Contrary to the reasoning of the Court of Appeals in *Telex* and in this case, *Alcoa* clearly held that conduct need not be "predatory" or "sinister" in tone in order to bring the possessor of monopoly power over the line from permissible conduct into illegality under Section 2, and that it is no defense to have done no more than use maneuvers honestly industrial or to have endeavored only to preserve the monopolist's share of the market. It is enough either (1) that the monopolist meant to preserve its dominating hold, or (2) that among other reasons, whatever they were, he acted with intent to prevent competition or destroy a competitor.

In *Alcoa* Judge Hand further demonstrated the irrelevance of the fact that Alcoa had not made exorbitant profits. (148 F.2d at 426, 427.) It is no defense to a price-fixing conspiracy that the prices fixed are "reasonable" or indeed that the conspirators end up, because of industry over-capacity, bad judgment, or other factors, operating at a loss; the offense under Section 1 lies in the concert, and it is said that courts have no competence to determine the reasonableness of prices. *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927). Similarly, courts have no more competence to determine reasonableness of prices of a single firm monopolizer, and the offense under Section 2 lies in the monopolization. The fact that Respondent incurred huge losses in order to drive out Petitioner and ward off new venture capital faces Judge Hand's statement:

> Indeed, it may be thought a paradox to say that anyone has the monopoly of a market in which at all times he must meet a competition that limits his price. *We shall show that it is not.* 148 F.2d at 425; emphasis added.

In a famous passage Judge Hand also said:

> Many people believe that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone. 148 F.2d at 427.

We submit that the meaning of *Alcoa* is clear. Intent in the case of actual monopoly consists in the purposeful maintenance of market power and position. The possessor of monopoly power cannot be permitted the same range of business practices available to those facing competition on the merits from rivals representing a real challenge.

That, we submit is not only the meaning of *Alcoa.* It is the meaning of Section 2. If, as we believe, it is the law already stated beyond question, this Court should grant the Writ to remove the stultifying and dangerous precedents represented by this case, and by *Telex* as well.

The Writ should be granted to resolve the division among the Circuits created by the decision of the Court of Appeals in this case, and to authoritatively adopt the rule of the *Alcoa* case. The Court should declare authoritatively for the courts of the United States an intent requirement that recognizes, as did Judge Hand in the *Alcoa* case, that the actual monopolist presents a significantly greater threat to competition than does the firm that has not demonstrated actual power of monopolization.

2. The Writ Should Be Granted to Correct the Erroneous Ruling That in Attempted Monopolization Cases Something in Addition to Specific Intent to Destroy Competition or Create a Monopoly Must Be Shown Such as Predatory or Sinister Conduct.

If the monopolization claim were not established in this case, one would then be obliged to examine the trial court's *alternative* finding that Respondent unlawfully attempted to monopolize. As is uniformly recognized, a charge of attempted monopoly under

Section 2 of the Sherman Act requires proof that Respondent's conduct was motivated by a specific intent to monopolize. The Court of Appeals in this case, however, has imposed a standard of proof regarding such intent that is patently erroneous. Among the previously decided cases, only the Tenth Circuit Court's opinion in the *Telex* case, which was settled before this Court ruled on the Petition for Writ of Certiorari, has held that a plaintiff in a Section 2 attempt case must meet the requirement of proving specific intent to monopolize by evidence that the conduct of the defendant injurious to competition was "sinister." As will be demonstrated, however, the decided cases are, at best, confused and chaotic in their attempts to go beyond the formulation "specific intent to monopolize" and further define the applicable standard of intent. The Court of Appeals in this case has imposed by its holding a criminal standard of intent never contemplated by Congress in enacting the Sherman Act and never countenanced by this Court.

Judge Hoffman's finding of specific intent was not rejected by the Court of Appeals, and controls this aspect of the case. The District Court observed:

> In order to establish such an attempt [to monopolize], the plaintiff must show that the defendant had the specific intent to destroy competition or create a monopoly . . . . (Appendix B, p. 59.)
>
> * * *
>
> As is claimed by [Petitioner] there is ample evidence of predatory intent. (Appendix B, p. 60.)

The District Court then made this finding:

> Respondent's extended below cost selling combined with its other acts provide the specific intent in the case at bar.
> We find this intent notwithstanding the fact that a company which reduces prices in defense of its economic life is not guilty of eliminating competition. (Appendix B, p. 60.)

The Court of Appeals did not reject as clearly erroneous Judge Hoffman's finding that there was "specific intent to destroy com-

petition or create a monopoly, that [Respondent] took overt acts pursuant to this intent, and that a dangerous probability of monopoly existed." (Appendix B. p. 59.) Necessarily, therefore, the Court of Appeals has established as part of the plaintiff's burden in attempted monopoly cases a requirement that goes beyond the specific intent declared by the District Court.

The Court of Appeals first correctly observed:

> A case of attempted monopolization requires proof that [Respondent's] conduct was motivated by specific intent to monopolize . . . . (Appendix A, p. 2.)

Its next step removed its analysis from the conception of "specific intent to monopolize":

> The fundamental issue is whether [Respondent] engaged in *predatory* price cutting. (Appendix A, p. 3; emphasis added.)

The third step taken in the Court of Appeals' sequence of logic is so far removed from the conception of "specific intent to monopolize" as to be unrelated to it. After reviewing some of the District Court's factual findings, and seriously misconstruing a key finding,[10] and after reviewing Respondent's *contested* evidence,

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10. At Appendix A, page 6, the Court of Appeals erroneously stated:

> In the circumstances of the industry, the trial court found [Respondent's] prices alone were not a sufficient basis for an inference of predatory intent.

At Appendix A, page 11, the Court of Appeals based its ultimate ruling on this error:

> If the trial court correctly found [Respondent's] pricing was not predatory in itself, we do not believe [Respondent] can be found guilty of violating the Sherman Act.

Respondent asserted the foregoing interpretation of Judge Hoffman's liability opinion in its brief in the Court of Appeals (pp. 28-29), citing pages 42-43 of that opinion (Appendix B, pp. 60-61). Nothing on those pages, or anywhere else in Judge Hoffman's opinion, states that Respondent's below-cost pricing was insufficient alone to sustain his specific intent finding. Indeed, Judge Hoffman implies the contrary:

> It is not *just* the sales below cost, however, which convince us that [Respondent] possessed the requisite predatory intent. Kerr-McGee's other activities are equally persuasive. (Appendix B, p. 61; emphasis added.)

the Court of Appeals reasoned:

> The trial court rejected [Respondent's] contention that this evidence showed an absence of *predatory intent.*
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> * * *
>
> The [District] [C]ourt's holding that [Respondent's] conduct was *predatory* is based on its effect as a competitor rather than its effect on competition.
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> * * *
>
> *Predatory* pricing is the essential unfair means alleged in this case. The other practices employed by [Respondent] inflicted no independent harm. They were merely auxiliaries to its general pricing policies and *indicate nothing more than an intent that its pricing succeed in excluding Petitioner from the market.* . . .
>
> The term [predatory] "does not have a well-defined meaning in the context it was used, but it certainly bears a sinister connotation." [Citing *Telex,* 510 F.2d at 927.]
>
> * * *
>
> We conclude that in the circumstances of this case prices below total cost would be more consistent with the competitive goals of the antitrust laws.
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> * * *
>
> The evidence shows that this is not a case of short-run price cutting designed to secure monopoly profits in the long run. . . . There is nothing in the record to warrant a finding that [Respondent] engaged in predatory pricing. (Appendix A, pp. 9, 10, 11, 13, 15; emphasis added.)

Thus, the Court of Appeals' opinion began, as it should have done, as an inquiry into the sufficiency of the evidence to sustain Judge Hoffman's finding that Respondent's "extended below-cost selling combined with its other acts provide the specific intent [to monopolize] in the case at bar." (Appendix B, p. 60.) Without reference to the "clearly erroneous" standard of Rule 52, Federal Rules of Civil Procedure, and without reference to the

District Court's finding of "specific intent," but after conversion of the legal standard by main strength from "specific intent" to *predatory conduct,* the Court of Appeals simply obliterated without direct engagement or review the careful findings of the District Court.

Notions of "predatory intent," "predatory conduct," and "sinister" conduct do not and should not provide the standard for determining "specific intent to destroy competition or build monopoly" (*Times-Picayune Pub. Co. v. U.S.,* 345 U.S. 594, 626 (1953)) in an attempted monopoly case. The concept of "predatory intent" or "predatory pricing" has its principal origins not in cases arising under Section 2 of the Sherman Act, but in Robinson-Patman cases, as a mechanism for assessing the probability that discriminatory pricing will have the prohibited adverse effect on competition. *E.g., Utah Pie Co. v. Continental Baking Co.,* 386 U.S. at 696, n. 12.

It is of course true that predatory pricing or conduct may serve as evidence of specific intent to monopolize. As this Court observed in the *Utah Pie* case:

> [A] jury would be free to ascertain a seller's intent from surrounding economic circumstances, which would include persistent unprofitable sales below cost and drastic price cuts themselves discriminatory. See Rowe, Price Discrimination Under the Robinson-Patman Act 141-150 (1962), commenting on the Court's statement in F.T.C. v. Anheuser-Busch, Inc., supra, that "a price reduction below cost tends to establish [predatory] intent." 363 U.S., at 552, 80 S.Ct., at 1276. See also Ben Hur Coal Co. v. Wells, 10 Cir., 242 F.2d 481, 486, and Balian Ice Cream Co. v. Arden Farms Co., supra, 231 F.2d at 368, in which the courts recognized the inferential value of sales below cost on the issue of intent. 386 U.S. 685 at 696-7, n.12.

In *Utah Pie,* the Tenth Circuit had reversed a jury verdict in favor of the plaintiff on the theory, as in this case, that the trial court

had acted on an *injury to a competitor* rather than *injury to competition.* Here the Court of Appeals criticized Judge Hoffman's analysis and result as "based on [Respondent's] effect on a competitor rather than its *effect on competition.*" (Appendix A, p. 10; emphasis added.) The Court rejected the very reasoning employed by the Court of Appeals in this case in the following terms:

> It might be argued that the respondents' conduct displayed only fierce competitive instincts. *Actual intent to injure another competitor does not, however, fall into that category,* and neither, when viewed in context of the Robinson-Patman Act, do persistent sales below cost and radical price cuts themselves discriminatory. 386 U.S. at 702-3, n. 14; emphasis added.[11]

The concept of "specific intent to monopolize" is a broad and elastic one. In this sense, it is no different from questions of intent that must be resolved by triers of fact in many other set-

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11. A case remarkably similar in many respects, though in a different industry and not involving actual monopoly power, is *Sanitary Milk v. Bergjans Farm Dairy, Inc.,* 368 F.2d 679 (8th Cir. 1966). In that case the Eighth Circuit approved an instruction that permitted the jury to find an attempt to monopolize if

> the defendants, or any one of them, entered into a conspiracy to fix prices, "gave unlawful price discriminations to favored chain stores in order to get large volume of sales", sold below cost or at unreasonably low prices in order to destroy competition . . . "started a price war" in order to increase sales of raw milk . . ., "if done with the intent to acquire the power to fix the price, exclude competitors, or control the production of milk [in the relevant market]. 368 F.2d at 690.

In approving that instruction, then Circuit Judge Blackmun made the following pertinent observation:

> Sanitary's dominant position in raw milk production was necessarily an element of influence in anything it might choose to do and demanded caution on its part when it embarked on processing. . . . We must consider the evidence as a whole. "In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each". [Quoting the opinion of Mr. Justice White for the Court in *Continental Ore Co. v. Union Carbide & Carbon Corp.,* 370 U.S. 690, 698 (1962).] 368 F.2d at 691.

tings. Nor is it different from other elastic legal concepts widely applied in the law, such as reasonableness, fair competition, fair comment, and the like. Specific intent, like the other concepts, is an ultimate factual question. It requires, indeed it permits, no particularized definition. The necessary concomitant of its breadth, its elasticity, and its basic factual nature is that it is an issue as to which it is for the trier of fact, from all the evidence, to determine whether a defendant was motivated by specific intent to monopolize.

This Judge Hoffman did. Because of the realities in this area, "conduct becomes a proxy for intent." (Sullivan, ANTITRUST, p. 135 (West Pub. Co., 1976).) Alternatively stated, "proof of the intent that outlaws any given conduct as an attempt to monopolize is most often derived from proof of the conduct itself." (Cooper, *Attempts in Monopolization, a Mildly Expansionary Answer to the Prophylactic Riddle of Section 2*, 72 Mich. L. Rev., 373, 397 (1974).) Judge Hoffman had before him massive evidence of conduct, and other indicia of intent as well. It necessarily follows that much deference must be given to the trier of fact, who has heard the witnesses, observed their demeanor, and considered all of the evidence.

Judge Hoffman found that Respondent was motivated by specific intent to monopolize in setting its below-cost prices, in forecasting procurement of all A/P business, in engaging in unreasonable surveillance of Petitioner, in projecting future prices that were high when its surveillance indicated Petitioner's imminent demise and low when Petitioner unexpectedly weathered the storm, in impairing Petitioner's small business classification, in attempting to impair Petitioner's existing contract with United Technology Corporation by offering a non-existent surplus of A/P at $.09 to $.10 per pound, two-thirds of the already below-cost price of A/P, and in incurring losses of $1,607,084 in its

A/P operations during the damage period (Appendix B, p. 37) in order "to recoup the losses of a price war by monopoly pricing . . . ." (Appendix C, p. 99.)

The Court of Appeals accepted all of these events as facts, but rejected them as irrelevant. It did so *not* because they were not found to be evidence of specific intent to monopolize, but because it thought the pricing conduct alone not "predatory" or "sinister," and because the other acts "inflicted no independent harm." (Appendix A, p. 11.) The analysis of the Court of Appeals is backwards. The question is not whether those other acts inflicted independent harm; the question is whether those acts constitute evidence from which a fact-finder may conclude that Respondent was motivated by specific intent to monopolize. The Court of Appeals neither asked nor answered that question. As to pricing, the question is not, as the Court of Appeals saw it, whether Respondent engaged in predatory pricing; the question is whether Respondent's pricing practices constituted evidence from which a fact-finder might conclude that Respondent was motivated by specific intent to monopolize. The Court of Appeals neither asked nor answered that question.

The proper inquiry for the Court of Appeals was whether the evidence, taken in its entirety, was such that Judge Hoffman's finding that Respondent "consciously chose and implemented" a decision to "actively pursue the acquisition of a monopoly" (Appendix C, p. 99) was "clearly erroneous." The Court of Appeals did not ask or answer that question. Rather than considering the evidence in its entirety, the Court of Appeals took the approach of "tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each."[12] The Court of

12. A method of appellate review found by this Court to have been employed by the Tenth Circuit and vigorously rejected in the quoted language. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 698 (1962).

Appeals then dismissed Respondent's predatory acts other than pricing because "they inflicted no independent harm," and its below-cost pricing practices because they were thought to be not "predatory" or "sinister" even though intended to destroy Petitioner.

The Court of Appeals failed not only to follow the directive of the *Union Carbide* case, quoted above, it also failed to heed the admonition of this Court in *United States v. Yellow Cab Co.*, 338 U.S. 338, 341-2 (1949):

> Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them.

Judge Learned Hand in *Alcoa* made substantially the same observation:

> [U]pon an issue like the witness's own intent, as to which he alone can testify, the finding [of the trial court] is indeed "unassailable," except in the most exceptional cases. 148 F.2d at 433.

See also, Denison Mines Ltd. v. Michigan Chemical Corp., 469 F.2d 1301, 1309-1310 (7th Cir. 1972).

Although this Court has never done so, other Circuits have discussed the concept of predatory intent in attempted monopoly cases, thereby creating the confusion that has led to the Court of Appeals' ultimate error in this case.[13] Although the Circuit

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13. Indicative of the confusion and inconsistency concerning whether predatory conduct is a required element for a finding of an attempt to monopolize are *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1349 (3d Cir. 1975) ["From the evidence of predatory practices . . . the jury could infer the intent and probability of success necessary to establish a section two violation"]; *Chisholm Brothers Farm Equipment Co. v. International Harvester Co.*, 498 F.2d 1137, 1144-1145 (9th Cir. 1974) ["[T]his specific intent 'must be accompanied by predatory conduct directed to accomplishing the unlawful purpose' "]; *Moore v. Jas. H. Matthews and Co.*, 1977-1 Trade Cases ¶ 61,376 at p. 71,364 (9th Cir. 1977) ["The rule in this circuit is that dangerous probability can be

cases are confused, and even the same circuit, the Ninth, may have rendered inconsistent opinions, no other Circuit appears to have done as the Court of Appeals has done in this case and in the *Telex* case in literally substituting a legal standard of predatory acts, each of which must inflict independent harm, for the fact finder's conclusion on the ultimate factual issue of specific intent to monopolize. The confusion, or potential for confusion, that the cited Circuit court cases created, in borrowing the concept of predatory intent from Robinson-Patman cases for application in attempted monopoly cases has come to full blossom in this major error of the Tenth Circuit, committed both in this case and in *Telex.*

The issue thus presented urgently requires the corrective and clarifying attention of this Court. Only rarely does a case arise that affords the Court an opportunity to clarify the standard of

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inferred from: either specific intent coupled with monopoly power *or* from 'proof of specific intent to set prices or exclude competition . . . accompanied by predatory conduct directed to accomplishing the unlawful purpose' " (emphasis by the court)]; *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 474 (9th Cir. 1964) ["[T]he specific intent itself is the only evidence of dangerous probability the statute requires . . ."]; *Morning Pioneer, Inc. v. Bismarck Tribune Co.*, 1974-1 Trade Cases ¶ 74,956 at p.96,260 (8th Cir. 1974) ["To establish an 'attempt to monopolize' in violation of § 2 of the Sherman Act, it is necessary to prove: (1) a specific intent to monopolize; (2) an overt act or acts; and (3) a dangerous probability of monopolization of a specific product market in a particular geographic market"]; *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561, 586 (10th Cir. 1961) [Where the trial court's refusal to instruct the jury that the specific intent must be accompanied by conduct sufficient to create "a dangerous probability of monopolization" was upheld]; and *Yoder Brothers, Inc. v. California-Florida Plant Corp.*, 537 F.2d 1347, 1368 (5th Cir. 1976) ["In order to prove attempted monopolization, the plaintiff must show an intent on the defendant's part to bring about a monopoly and a dangerous probability of success."]. *See also, Lektro-Vend Corp. v. Vendo Co.* 403 F.Supp. 527,533 (N.D.Ill. 1975) ["To prove violation of section 2, plaintiffs must establish three elements of proof: (1) a dangerous probability of actual monopolization in a relevant market; (2) specific intent to establish a monopoly power; and (3) overt acts"]; and *V. & L. Cicione, Inc. v. C. Schmidt & Sons, Inc.*, 403 F.Supp. 643, 652 (E.D. Pa. 1975) ["[T]wo requisites (for attempt to monopolize claims are) specific intent to monopolize and dangerous probability of success . . ."].

intent in actual monopolization cases (see Question 1 above) *and* the standard of intent in attempted monopoly cases, on the same record and facts, and to pronounce those standards authoritatively in a context in which they may be compared and contrasted. The unique opportunity afforded by this case for the Court to clarify important principles and resolve conflicts and confusion among the Circuits is heightened by the presence of the Robinson-Patman claims, which afford convenient occasion for examination of the origins of the concept of predatory intent and the relationship of that concept as it has developed in the Robinson-Patman cases to the standard of specific intent in attempted monopoly cases.

3. The Writ Should Be Granted to Review the Court of Appeals' Holding That Even Over the Long Run, the Legality of Below Cost Sales Is to Be Measured by Marginal Cost Rather Than Fully Allocated Cost.

The Court of Appeals has not only held that a finding of specific exclusionary intent on the part of a dominant, diversified, wealthy and entrenched competitor fails to establish a specific intent to monopolize. It has compounded that error by its ill-advised endorsement of that competitor's sales over a seven-year period at prices greatly below cost because those prices were above "marginal cost." Reliance on the supposed fact that Respondent did not price-cut below its marginal costs is misplaced. *To allow one having monopoly power to undercut competitors to the point of their destruction because it remains above its own marginal cost is to say that the monopolist may use the advantages bestowed on it by monopoly to legalize that monopoly!* Secure in the knowledge that from its past and current dominance its costs are not less than its only competitor, and that it can bear a price destructive to that competitor because of its unique renegotiation position[14] and its overwhelming financial power, Respondent was plainly and simply exercising its monopoly power.

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14. See discussion at p. 8, supra.

Marginal cost was not defined by the Court of Appeals (just as it was never defined by Respondent in the conduct of its business), but it was defined by the District Court. It is "the cost of producing an additional unit of production." (Appendix C, p. 97, n. 1.)

In *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act,* 88 Harv. L. Rev. 697 (1975), Professors Areeda and Turner presented a sophisticated econometric analysis of a proposed, evidently separate offense under Section 2 of the Sherman Act called a " 'predatory pricing' antitrust offense." (88 Harv. L. Rev. at 697.) Among many other arguments, Areeda and Turner suggest that prices at or above marginal cost but below full cost *in the short run* "should not be considered predatory." (88 Harv. L. Rev. at 711.) Other related articles are a reply by F. M. Scherer, former Director of the Bureau of Economics of the Federal Trade Commission, *Predatory Pricing and the Sherman Act: A Comment,* 89 Harv. L. Rev. 869 (1976), a reply by Areeda and Turner, *Scherer on Predatory Pricing,* 89 HARV. L. REV. 891 (1976), and a rejoinder by Scherer, *Some Last Words on Predatory Pricing,* 89 Harv. L. Rev. 901 (1976).

The initial article is seriously oversimplified by the Court of Appeals:

> Professors Areeda and Turner argue that any price above a firm's marginal cost . . . should be conclusively presumed lawful. (Appendix A, p. 14.)

The Court of Appeals fails to note the concession by Areeda and Turner that this simplistic rule is utterly inconsistent with *Moore v. Mead's Fine Bread Co.,* 348 U.S. 115, 118 (1954) [discussed at 88 Harv. L. Rev. at 699, n. 10], and *Utah Pie Co. v. Continental Baking Co.,* 386 U.S. at 698, 690 (1967) [discussed at 88 Harv. L. Rev. at 726-27], which Areeda and Turner criticize severely. Both are Robinson-Patman cases, and condemn sales below full cost as predatory and therefore potentially injurious to competi-

tion. Areeda and Turner also acknowledge their rejection of, and criticize, the relevant Circuit court cases, including *Porto Rican American Tobacco Co. v. American Tobacco Co.*, 30 F.2d 234, 236 (2d Cir. 1929), *cert. denied*, 279 U.S. 858; *National Dairy Products Corp. v. United States*, 350 F.2d 321, 327 (8th Cir. 1965), *vacated and remanded on other grounds*, 384 U.S. 883; *Forster Mfg. Co. v. FTC*, 335 F.2d 47, 53 (1st Cir. 1964), *cert. denied*, 380 U.S. 906; *Maryland Baking Co. v. FTC*, 243 F.2d 716, 718 (4th Cir. 1957); and *E. B. Muller & Co. v. FTC*, 142 F.2d 511, 517 (6th Cir. 1944). [88 Harv. L. Rev. at 699.]

The Areeda and Turner suggestions have been favorably received by the Fifth Circuit in *International Air Indus., Inc. v. American Excelsior Co.*, 517 F.2d 714, 723 (5th Cir. 1975), *cert. denied*, 424 U.S. 943, the Ninth Circuit in *Hanson v. Shell Oil Co.*, 1976-2 Trade Cases ¶ 61,052 (9th Cir. 1976), *cert. denied*, January 24, 1977 (CCH Trade Reg. Rptr. ¶ 60,021 at p. 65,093) and the Court of Appeals in this case.

The favorable reception accorded Areeda and Turner by the Fifth and Ninth Circuits, and the Court of Appeals' flat adoption of conclusively legal marginal cost pricing in this case, have created a serious conflict among the Circuits. Given the infrequency with which cases squarely presenting the marginal cost pricing issue are likely to come before the Court, particularly under the Sherman Act (*no* Sherman Act decisions of this Court are cited by Areeda and Turner as actually involving supposed marginal cost pricing), consideration and resolution of that conflict is imperative, unless the Court is to endorse by silence the emasculation of *Utah Pie*.

The Court of Appeals reaches the following wholly inconsistent conclusions:

> (1) Respondent had "an intent that its pricing succeed in excluding [Petitioner] from the market." (Appendix A, p. 11.)

(2) "[I]n the circumstances of this case prices below total cost would be more consistent with the competitive goals of the antitrust laws." (Appendix A, p. 13.)

(3) "The low prices for A/P persisted into the long run *(a period of nearly seven years)*. . . . The evidence shows that this is not a case of short-run price-cutting designed to secure monopoly profits in the long run." (Appendix A, p. 15; emphasis added.)

(4) "There is nothing in the record to warrant a finding that Respondent engaged in predatory pricing." (Appendix A, p. 15.)

Whatever else might be said for or against the "marginal cost" pricing hypotheses advocated by Areeda and Turner, it was clearly erroneous for the Court of Appeals to apply that concept in evaluating the legality of Respondent's prices in this case. In the first place, neither Areeda and Turner nor any judge or commentator other than the Court of Appeals in this case has suggested that the "marginal cost" view of below-cost pricing might in any way immunize from the antitrust laws a defendant found to have the specific intent "that its pricing succeed in excluding [a competitor] from the market." (Appendix A, p. 11.)

Further, and even more significant, the Court of Appeals has applied the "marginal cost" test of Respondent's pricing to a period found by the Court of Appeals to be long-run, involving nearly seven years of sustained below-cost selling. The entire thrust of Areeda and Turner exploration is addressed to the propriety of a company's prices under appropriate *short-run* circumstances. Aside from the Court of Appeals in this case, no authority has suggested that the dominant seller in a two seller industry could act lawfully in knowingly and intentionally selling its product below cost for a sustained period of seven years for the express purpose, as both the District Court and the Court of Appeals found, of excluding its rival.

On the contrary, in his reply to Areeda and Turner, F. M. Scherer observes:

> (1) That the Areeda and Turner marginal cost test for predation must in any event be rejected if the pricing practices involved were sustained over a long period.
>
> (2) That marginal cost pricing can only be considered rational and nonpredatory in the short run and that the appropriate goal for antitrust enforcement should, in contrast, be long-run maximization of profits. 89 Harv. L. Rev. at 869.

A fair reading of Areeda and Turner, Scherer's initial reply, and the respective final articles cited above, compels a conclusion wholly contrary to that adopted by the Court of Appeals, to wit: where the dominant firm has sold far below its full cost, but above its marginal costs, for a period far beyond the short run, and where there is substantial additional evidence of its intent to monopolize and its determination to exclude a rival, such conduct should be *conclusively presumed unlawful.* That conclusion finds substantial support in *Utah Pie.* (386 U.S. at 699.)

The application of the "marginal cost" concept by the Court of Appeals in determining whether Respondent's prices were illegal disregards the lesson of *Utah Pie* that prolonged sales below full cost constitute evidence of predatory intent, particularly where such below-cost sales are used as a "medium of eliminating weaker competitors." *Porto Rican American Tobacco Co. v. American Tobacco Co., supra; see also, Moore v. Mead's Fine Bread Co., supra.* In *International Air Indus., Inc. v. American Excelsior Co., supra,* the Fifth Circuit acknowledged that the decision of this Court in the *Utah Pie* case "may hold that it is not necessary to show a price below marginal cost in order to make out a prima facie case" of violation of the Robinson-Patman Act. (517 F.2d at 724, n.30.)

The Court's definition of "cost" in *Utah Pie* is plainly inconsistent with the Court of Appeals' adoption of conclusively-lawful marginal cost pricing. In *Utah Pie* the Court condemned as a "discriminatory below-cost price" (386 U.S. at 699) a price which was "less than [defendant's] direct cost plus an allocation for overhead." (386 U.S. at 698.) Marginal cost is, of course, far below direct cost, let alone "direct cost plus an allocation for overhead." The definition of "cost" as such was not central to the Court's opinion in *Utah Pie*. The case thus probably cannot be fairly read as finally dispositive of the definition of cost, particularly for purposes of determining specific intent to monopolize in violation of Section 2. *Utah Pie*, however, gives no comfort to Respondent, which argues for the conclusive legality in both Section 2 and Robinson-Patman contexts of sales far below the cost levels there condemned.

The Court was not seduced by fancy and transient econometric hypotheses in *Utah Pie*. Similarly, the Tenth Circuit also has formerly shown an appreciation for reality as distinguished from theory.

For example, in *Ben Hur Coal Co. v. Wells*, 242 F.2d 481, 486 (10th Cir. 1957), the Tenth Circuit said:

> In the final analysis, the question resolves itself into one of intent and purpose, *not a choice of accounting methods.* Emphasis added.

Yet in its decision in this case the Court of Appeals completely disregarded the hard facts of intent and purpose. It embraced an economic theory of cost-pricing relationships and ignored an overwhelming record of anticompetitive intent and purpose on the part of Respondent.

To so blindfold itself to the plain facts of the case and decide the critical issue of intent on an "economist's hypothetical model" (which is all that "marginal cost" pricing amounts to, particularly in light of the fact that the record contains no evidence

whatsoever that Respondent set its prices based upon its marginal cost), flies in the face of this Court's rulings in *Illinois Brick Co. v. State of Illinois*, 145 U.S. L.W. 4611, 4617 (June 7, 1977), and *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 493 (1968).

The Court of Appeals' adoption of the conclusive legality of marginal cost pricing, even in the admitted long run, foreclosed consideration and meaningful review of the District Court's exhaustive analysis and findings that, *based on all the evidence,* Respondent was motivated by the specific intent to monopolize. Indeed, *the Court of Appeals acknowledged that Respondent intended "that its pricing succeed in excluding [Petitioner] from the market."* (Appendix A, p. 11; emphasis added.) In holding such pricing practices conclusively lawful, the Court of Appeals violated the principle stated by the Court in *Utah Pie*:

> It might be argued that the respondents' conduct displayed only fierce competitive instincts. Actual intent to injure a competitor does not, however, fall into that category . . . . 386 U.S. 685 at 702-703, n. 14.

The holding of the Court of Appeals not only conflicts with this sound principle, but is in conflict with the decisions of other Circuits in adopting a standard of conclusively-lawful marginal cost pricing.

Equally or even more efficient competitors facing adversaries with long purses, as in this case, have been certified by the Court of Appeals as fair game for extermination by price cutting without limit as to time, so long as the prices of the dominant firm are not cut below marginal cost. The ruling puts at risk every small business, and many large ones, that compete with adversaries whose only advantage is overwhelming financial muscle or, as in this case, both overwhelming financial muscle and a special renegotiation capacity. Judge Hoffman laid his hand on this key point early in the trial. He interposed a comment during

the examination of D. C. Cable, Respondent's financial analyst and government contracts administrator.

In 1965, Cable had advised his superiors to cease "pricing on the expectation of forcing [Petitioner] to shut down" (Appendix A, p. 6):

> Q. For how long a period of time do you believe [Respondent] having other plants and operations and other products could have been able to sustain losses in the magnitude of those indicated here [on Respondent's renegotiation reports] on its A/P?
>
> A. From the standpoint purely of financial muscle, there's no reason why that couldn't continue.
>
> Q. Forever, right?
>
> A. From that specific standpoint, yes.
>
> THE COURT: Until the 800 million is gone. (JA 1433.)

CONCLUSION

On each isue, the Court of Appeals' holding is unprecedented. Each holding, moreover, represents a significant compounding of the plaintiff's burden in monopolization cases. Given the weight of that burden under the best of circumstances, and the importance of the private action to the implementation of national antitrust policy, the decision of the Court of Appeals in this case should not be the last word on these three important issues.

Moreover, the District Court's careful and detailed findings control the first two issues in this case. Though controlling, and not rejected, the Court of Appeals has failed to accord these findings the effect to which they are entitled. The federal antitrust laws are entitled to more. So also is a distinguished trial judge who invested the better part of five years in the creation of an enormous record and in an exhaustive analysis of that record.

The issues in this case are of nerve center importance to Section 2 of the Sherman Act, just as they were in the *Telex* case, which this Court did not have the opportunity to review. This case represents an opportunity that probably will not arise

again in this generation, and perhaps may never arise again, for the Court to consider and declare clearly in a single case on a common record the governing law on these core issues:

(1) The appropriate standard of intent and the permissible range of competitive conduct in a case of clear monopoly power and monopoly market shares.

(2) The appropriate standard of intent in a case of attempted monopoly where the Court of Appeals has substituted a predatory conduct standard for specific intent to monopolize, and where a Robinson-Patman claim is present to provide a useful reference to the doctrinal source of "predatory intent."

(3) The legality of marginal cost pricing intended by a competitor (with, as a practical matter, limitless resources) not only to injure, but to obliterate an equally or more efficient rival with lesser financial muscle.

These issues warrant the attention of this Court on the merits. The Writ of Certiorari should issue.

Respectfully submitted this 22d day of July, 1977.

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CERTIFICATE OF SERVICE

Pursuant to Rule 33, subdivision 3(b), of the Supreme Court of the United States Revised Rules, the undersigned, a member of the Bar of the Supreme Court of the United States, having duly entered his appearance in the foregoing cause as counsel of record by the filing of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, hereby certifies that, in conformity with Rule 33, subdivision 1, the foregoing Petition was served upon Respondents Kerr-McGee Corporation and Kerr-McGee Chemical Corporation by depositing three copies thereof, including Appendices A, B and C thereto, in the United States Mails, with air mail postage prepaid, addressed to Respondents' counsel of record as follows, this 22d day of July, 1977:

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Appendix A

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 76-1238

Pacific Engineering & Production
Company of Nevada,
Plaintiff-Appellee,

v.

Kerr-McGee Corporation and
Kerr-McGee Chemical Corporation,
Defendants-Appellants.

Appeal from the United States District Court
for the District of Utah
(D.C. No. C-40-70)

Peter W. Billings (Albert J. Colton, Stanford B. Owen, and Peter W. Billings, Jr., Salt Lake City, Utah; Peter J. Nickles, Eugene D. Gulland, Washington, D.C.; Willard P. Scott, Thomas R. Cochran, and William Heimann, Oklahoma City, Oklahoma, on the brief), Salt Lake City, Utah, for Defendants-Appellants.

C. Keith Rooker (Richard W. Giauque, Salt Lake City, Utah; William D. Hall and Kenneth L. King, Washington, D.C., on the brief), Salt Lake City, Utah, for Plaintiff-Appellee.

Before HILL, McWILLIAMS and BARRETT, United States Circuit Judges.

HILL, Circuit Judge. [1]

This is an antitrust action brought by Pacific Engineering & Production Company of Nevada (PE) against Kerr-McGee Chemical Corporation (successor to American Potash and Chemical Co., which shall be referred to as AMPOT) and its parent corporation, Kerr-McGee Corporation. The trial court gave PE judgment for treble damages totaling $4,590,594 and for attorneys' fees of $528,000 [sic] based on its finding that AMPOT was guilty of monopolizing and attempting to monopolize in violation of § 2 of the Sherman Act, 15 U.S.C. § 2, and of price discrimination in violation of § 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a). The court also dismissed AMPOT's counterclaims against PE.

The trial court's findings are commendably thorough and exact as to the basic facts. We disagree, however, with the application of the antitrust laws to those facts and reverse the judgment for treble damages. The judgment is affirmed as to the dismissal of AMPOT's counterclaims. We will first consider the Sherman Act issues.

Section 2 of the Sherman Act proscribes both monopolizing and attempting to monopolize any part of trade or commerce. The elements of a monopolization case are (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of [2] a superior product, business acumen, or historic accident. United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966). A case of attempted monopolization requires proof that defendant's conduct was motivated by specific intent to monopolize and that a dangerous probability of monopoly existed. E. J. Delaney Corp. v. Bonne Bell, Inc., 525 F.2d 296 (10th Cir. 1975), *cert. denied*, ...U.S. ..... The distinctions between the two offenses are not relevant to our decision, because the same conduct was relied upon to estab-

lish both the attempt and the willful maintenance of monopoly. The fundamental issue is whether AMPOT engaged in predatory price cutting.

PE and AMPOT manufacture ammonium perchlorate (A/P), a chemical used almost exclusively as an oxidizer in solid rocket fuel. The ultimate consumer of A/P is the federal government. Demand is fixed by government procurement policies and thus is not responsive to price. The direct customers of PE and AMPOT are missile manufacturers for NASA and the Department of Defense.

The first A/P producer was Western Electrochemical Company which became AMPOT in 1954. Kerr-McGee acquired AMPOT in 1967 and reorganized it into the Kerr-McGee Chemical Corporation in 1970. PE was organized in 1955 by a former Western officer and began A/P production in 1958. The same year, two large industrial chemical manufacturers, Hooker [3] Chemical Co. and Pennwalt Chemical Corp., also entered the market.

In the period of 1954-1957, when AMPOT was the only A/P producer, the price was above 40 cents a pound. From 1958, when the other three firms entered the market, until 1961, the price ranged from 32 to 35 cents a pound. During this time the industry outlook was bright; the mood was characterized by one witness as euphoric. Industry capacity was increased in response.

By December 1963, this optimism had vanished. The anticipated demand did not materialize, primarily because of NASA's conversion from solid to liquid rocket fuel and the diversion of defense appropriations from missile programs to the Vietnam war effort. Prices continuously declined as the companies competed frantically for the work that existed. In 1964, prices first went below 20 cents a pound when PE bid a major order at 19.25 cents. In 1965, AMPOT bid 16.40 cents on another major procurement. The low point came early in 1966 at 14.92 cents,

bid by PE. Pennwalt closed its plant in 1965, and Hooker followed suit in 1966. Both continued to sell from inventory for about a year. The trial court found AMPOT's antitrust violations began in 1966 and continued through 1970. During this time, prices were between 15 and 20 cents a pound with the majority of sales being made at prices under 18.25 cents. [4]

The extent of the price cutting must be attributed in some part to the practices of the three major consumers of A/P which were prime contractors on such projects as Minuteman, Poseidon, and Titan missiles. The so-called Big Three[1] accounted for the bulk of total A/P sales. Their practice was to obtain all their A/P needs for a period of months or years in one contract. The winner of the contract secured a substantial share of the total market for the immediate future. In letting the contract, a buyer would first send out a request for quotes and bid the prime contract on the basis of the quotes received. These quotes in effect locked the A/P producers into a ceiling price. After receiving the prime contract, the buyer would again request quotes on which the A/P contract would supposedly be let. Instead of notifying the low bidder, however, the buyer would single out one or two low bidders and tell them to "sharpen their pencils" if they wanted the contract. Often a buyer would succeed in getting the low bidder to underbid itself. The trial court noted that these "whipsaw" tactics were "unethical if not unlawful."

The trial court recognized that until 1966 the decline in the A/P price was due to market forces beyond the control of AMPOT. The court held that after that time AMPOT began violating the antitrust laws because it "sought to take advantage of a troublesome situation and force PE out of the market." The primary

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1. These companies were Thiokol Chemical Corp. (the largest single purchaser of A/P), Aerojet General (a subsidiary of General Tire and Rubber Co.), and United Technology Center (a subsidiary of United Aircraft). In most years, these companies purchased over 55 percent of all A/P produced. [5]

factor in the trial court's decision was AMPOT's below-cost pricing. It is uncontested that AMPOT's prices of 15 to 20 cents were well below its average total cost[2] which, although not specifically set out in the findings, was probably in the range of 20 to 26 cents. AMPOT's prices were above its "out of pocket cost," that is, above average variable cost.[3] At this price, it was more profitable to produce than to shut down. The cost of producing A/P is highly volume-responsive and decreases consistently with increased production until full plant capacity is reached. Both AMPOT and PE possessed plant capacity sufficient to supply substantially the entire market for A/P.[4]

There was ample evidence that AMPOT knew PE could not survive at the low price level. PE was a one-product company which was vastly undercapitalized, while AMPOT was larger and more diversified. In 1965, a memorandum on the situation was prepared for AMPOT by a Mr. Cable, its government contracts administrator and special financial analyst. Cable based his memorandum on the following assumptions which proved to be essentially correct:

1. The costs of producing A/P are approximately equal within the industry.
2. A/P consumers are interested in maintaining two sources.

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2. Average total cost is the sum of fixed cost and total variable cost divided by output. Fixed costs are those expenses which do not vary with changes in output, including most management expenses, interest on bonded debt, depreciation of plant and equipment, property taxes, and other irreducible overhead. Variable costs are those which vary with changes in output, such as labor, material, fuel, etc. Areeda & Turner, *Predatory Pricing and Related Practices under Section 2 of the Sherman Act,* 88 Harv. L. Rev. 697, 700 (1975).

3. Average variable cost is the sum of all variable costs divided by output. *id.* [6]

4. PE's plant capacity was 20,000,000 pounds a year, and AMPOT's capacity was approximately 30,000,000 pounds a year. During the relevant period, demand was generally below 20,000,000 pounds a year. [7]

3. Pennwalt will not actively compete for business at the present price levels.
4. Present price levels for A/P will not give PE a profit and probably will not cover all its cost.

Cable observed that if PE were getting the same price as AMPOT, it could not survive and its plant would be of interest only to a consumer of A/P; if PE were getting a higher price, AMPOT could raise its prices without affecting its market share. Cable recommended prices be established with the expectation that the market must be shared with PE either as a going concern or as a subsidiary of a consumer. He recommended against pricing on the expectation of forcing PE to shut down. In the face of this knowledge, AMPOT continued its low prices. In 1968, AMPOT was bidding two to three cents a pound below PE. AMPOT's market share is indicative of the degree of its success in foreclosing PE from the market.[5]

Year	*Percentage*
1966	53.5
1967	80.0
1968	88.0
1969	67.0
1970	78.0

In the circumstances of the industry, the trial court found AMPOT's prices alone were not a sufficient basis for an inference of predatory intent. The evidence was found sufficient on the basis of other cumulative factors including AMPOT's market projections predicting the achievement of virtually all A/P business, its surveillance of PE's activities, its offer to "dump" a non-

5. There were issues at trial pertaining to the definition of the relevant market. A/P must be qualified for separate missile projects through a series of tests. AMPOT contended the market should not include several projects for which PE had not been qualified. The trial court found the relevant market included all A/P sold, and for our purposes we need not question that finding. However, the fact that PE was not qualified for certain projects (primarily because of the expense of the testing) did give AMPOT a significant head start in its market share. [8]

existent surplus of A/P to a PE customer at a drastically low price, AMPOT's opposition to PE's classification as a small business by the SBA, and AMPOT's forward price schedules which indicated an intention to raise prices after PE's demise.

The surveillance of PE was conducted by AMPOT's plant manager at Henderson, Nevada, where PE's plant also was located. It consisted of (1) a monthly check of the number of cars in PE's parking lot; (2) checking freight office records concerning the movement of freight cars in and out of PE's plant; (3) taking aerial photos of PE's plant on two or three occasions; (4) clipping articles in the local papers concerning PE's activities; (5) inquiring at the Colorado River Commission concerning PE's power consumption; and (6) encouraging the shipping foreman to inquire of truck drivers concerning shipments to PE.

AMPOT also engaged in intensive scrutiny of PE's relationship with American Cyanamid which had lent PE over $2,400,000 with a trust deed as security. When suit was filed to foreclose, AMPOT retained two Nevada attorneys to monitor the court files and keep it advised. In 1967, AMPOT learned American Cyanamid had agreed to subordinate its debt to allow PE to obtain a $500,000 loan and continue operating.

The "dumping" incident occurred in 1968 after PE had won a major contract from United Technology Center (UTC). J. C. Schumacher, AMPOT's vice president in charge of [9] manufacturing electrochemicals, visited UTC's president and asked if he would be interested in purchasing surplus A/P at nine or ten cents a pound. There was in fact no surplus. AMPOT's evidence indicated its sales department knew nothing of Schumacher's offer and repudiated it when inquiries were made. The trial court found this should be considered some evidence of the attitude of AMPOT in view of Schumacher's position with the company. Moreover, another AMPOT officer, in a subsequent memo to his file, relied on the incident as having placed a "seed of doubt" that a better price was available.

AMPOT's opposition to PE's reclassification as a small business for purposes of obtaining financial assistance from the Small Business Administration was found to be entirely legal. It was considered "symbolic" of AMPOT's intent to drive PE from the market.

The trial court attached major significance to AMPOT's forward pricing. On different occasions, the large A/P purchasers would request submission of tentative bids for future years. Generally, AMPOT's forward price schedules were high at times when it appeared PE's demise was imminent and were replaced by lower prices when it appeared PE would be able to continue. For example, in 1966 AMPOT learned that American Cyanamid had taken a summary judgment against PE and that an involuntary petition in bankruptcy had been filed against PE. AMPOT then submitted a higher forward price [10] schedule. In February 1967, AMPOT learned that American Cyanamid had agreed to subordinate its debt and that PE had obtained a loan. The next October, AMPOT submitted substantially lower forward prices.

AMPOT's witnesses testified that the forward prices were attempts to raise the A/P price and were withdrawn only under pressure from the purchasers. Shortly after the high price schedule was submitted in 1966, AMPOT met with representatives of two of the Big Three A/P consumers. AMPOT was told that its high prices were unacceptable. The consumers said they had been willing to let AMPOT become the sole supplier at the lower prices, but they would now attempt to keep PE alive. Two of the largest consumers did give PE "stay alive" orders at prices above those paid to AMPOT. The trial court rejected AMPOT's contention that it was forced to withdraw the higher prices and concluded instead that these events indicated AMPOT's intention to do whatever was necessary to drive out PE.

AMPOT also introduced evidence of its other attempts to rescue the A/P industry. In late 1965, AMPOT representatives

met with the Deputy Assistant Secretary of Defense in charge of procurement to complain about conditions in the industry. They pointed out that procurement practices and excess capacity were endangering the industry and that two [11] former suppliers had already "mothballed" their facilities. They said AMPOT desired a system providing both good prices for the government and a fair profit for suppliers. The government refused to take action and reminded AMPOT that it was bound by a "National Security Clause" in the contract under which it had purchased its plant from the Navy. The clause required that until March 1972 AMPOT maintain its plant so that it could be operable within 120 days. In light of this situation, AMPOT contended it had no choice but to produce at 15 cents a pound instead of shutting down.

By 1971, AMPOT felt it was close enough to the expiration of the National Security Clause that it could take affirmative action. It notified the Defense Department that it was considering permanent suspension of production. Subsequently, a solution known as the "SAMSO Agreement" was reached. The agreement imposed a division of the market between AMPOT and PE at a profitable price.

The trial court rejected AMPOT's contention that this evidence showed an absence of predatory intent. Another clause in AMPOT's government contract allowed it to petition for release from the National Security Clause in return for whatever consideration the government might request. Inquiries were made concerning whether AMPOT was interested in a release in return for a lump sum payment. AMPOT's failure to avail [12] itself of this relief was considered evidence that it was not seriously interested in exerting pressure to raise prices during the 1966-1970 period.

The trial court found AMPOT must have known it could raise prices without affecting its market share. The prices the court found could have been charged, however, were on the average higher than the forward prices which had provoked strenuous

objections from the powerful A/P buyers. During the period of alleged predation, prices actually became somewhat higher than they had been even though the industry continued to operate at less than 50 percent of capacity. Under the trial court's holding, the only way AMPOT could have avoided violating the antitrust laws was to raise prices to a noncompetitive level in order to save its smaller, undercapitalized rival. AMPOT's decision not to raise prices was held to be predatory conduct in violation of § 2 of the Sherman Act. Considering AMPOT's prices and its other practices together, the court found AMPOT's prices were predatory because they were set with the specific intent to drive PE from the market.

We believe there are fundamental flaws in the trial court's application of the Sherman Act. The court's holding that AMPOT's conduct was predatory is based on its effect as a competitor rather than its effect on [13] competition.[6] As we said in Atlas Building Products Co. v. Diamond Block & Gravel Co., 269 F.2d 950, 954 (10th Cir. 1959), *cert. denied*, 363 U.S. 843: "Antitrust legislation is concerned primarily with the health of the competitive process, not with the individual competitor who must sink or swim in competitive enterprise." In an industry plagued by falling demand and excess capacity, the sinking of a competitor may be an indication of a healthy competitive process.

In a two-firm industry, the exclusion of one firm necessarily results in a monopoly. That does not mean the survivor necessarily violates the antitrust laws. In Union Leader Corp. v. Newspapers of New England, Inc., 180 F. Supp. 125, 140, *modified*,

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6. The court's opinion demonstrates excessive concern with preventing the appearance of monopoly even if it requires defiance of the realities of the market situation. The same prices and other competitive practices which were found legal so long as there were four firms in the market were held to become illegal when the number dwindled to two. The trial court's holding simply makes no provision for the natural demise of an industry due to changes in consumer desires. [14]

284 F.2d 582 (1st Cir. 1960), *cert. denied,* 365 U.S. 833, the district court correctly stated:

> [A] person does not necessarily have an exclusionary intent merely because he foresees that a market is only large enough to permit one successful enterprise, and intends that his enterprise shall be that one and that all other enterprises shall fail. . . . To prove that a person has that type of exclusionary intent which is condemned in anti-trust cases there must be evidence that the person who forsees a fight to the death intends to use or actually does use unfair weapons. Putting the same idea in another way, we may say that there is no sharp distinction between (a) the existence of an intent to exclude and (b) the use of unfair means. . . .

Predatory pricing is the essential unfair means alleged in this case. The other practices employed by AMPOT inflicted no independent harm. They were merely auxiliaries to its general pricing policy and indicate nothing more than an intent that its pricing succeed in excluding PE from the market. "But intending the natural consequences of acts which are in all respects lawful, does not constitute the 'exclusionary intent' that is a prerequisite for finding a violation of section 2 [of the Sherman Act]." Union Leader Corp. v. Newspapers of New England, Inc., *supra* at 584. If the trial court correctly found AMPOT's pricing was not predatory in itself, we do not believe AMPOT can be found guilty of violating the Sherman Act.

The use of the term "predatory" to describe conduct violative of the antitrust laws has left much to be desired. This court has noted, "The term probably does not have a well-defined meaning in the context it was used, but it certainly bears a sinister connotation." Telex Corp. v. IBM Corp., 510 F.2d 894, 927 (10th Cir. 1975), *cert. dismissed,* 423 U.S. 802. The Supreme Court has indicated that any price below cost may be considered predatory. Utah Pie Co. v. Continental Baking Co., 386 U.S. 685, 696 n.12 (1967). We do not believe, [15] however, that the Court

has established a definitive standard. The Court was speaking of the "inferential value" of below cost sales. In some instances there is no inference to be taken from selling below total cost. It may even be desirable and certainly could not be considered "sinister."

The common circumstance in which sales below total cost may be expected is that of excess capacity. Professor Samuelson has noted in this circumstance the distinction between the interest of individual competitors and the ideals of competition.

> Competition, which the businessman regards as destructive, cutthroat, and ruinous, may actually be the only way to get the redundant plant capacity into operation or to discourage its maintenance. . . . Losses or subnormal profits is the free enterprise way of discouraging excess capacity.

P. Samuelson, *Economics* 496 (8th ed. 1970).

Excess capacity was precisely the problem facing AMPOT and PE. Each had plant capacity sufficient to supply substantially the entire demand for A/P. Individually, AMPOT and PE faced demand curves sharply responsive to price. With the nearly identical products, a small price cut by either of them could result in the acquisition of virtually all the business. Each of them also faced consistently decreasing marginal costs.[7] Additional units of A/P could be produced at less cost than previous units. In this situation, each competitor would be tempted to lower price and expand output to reach a lower point on its marginal cost curve. This in turn would drive the other competitor back up its marginal cost curve and increase its losses at the new, lower price.

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7. Marginal cost is the extra cost at any production level of producing one extra unit of the product. Marginal cost usually decreases over low levels of output and [16] increases as production approaches plant capacity. Areeda & Turner, *supra* 88 Harv. L. Rev. at 700. The consistently decreasing marginal costs in the A/P industry are abnormal. This phenomenon is a function of the industry's excess capacity and of the methods used in A/P production. [17]

The textbook response to this situation is either a price war resulting in the destruction of all but one firm or the establishment of some form of imperfectly competitive price leadership oligopoly. *See* Samuelson, *supra* at 452. AMPOT, with knowledge of the consequences, chose to engage in price competition and was found guilty of violating the Sherman Act. The trial court found that a rational, non-predatory duopolist would have employed price leadership to raise the price to a profitable level for both competitors.

Price leadership is not desirable competitive conduct. Any conduct tending to fix prices has been condemned in the strongest language. United States v. Container Corp. of America, 393 U.S. 333 (1969); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940). Conscious parallel pricing is circumstantial evidence of price fixing and may involve many of the same vices. *See* Theater Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537 (1954); Cackling Acres, Inc. v. Olson Farms, Inc., 541 F.2d 242 (10th Cir. 1976).

In this case, price leadership would invoke virtually all the disadvantages of monopoly. Both PE and AMPOT would have had to restrict output and to incur higher production costs. The selling price of the product would then be forced higher than it would be if one producer left the market. In addition, society would be saddled with the deadweight welfare loss resulting from idle and misallocated plant capacity. We do not believe the antitrust laws should be interpreted to encourage this result.

We conclude that in the circumstances of this case prices below total cost would be more consistent with the competitive goals of the antitrust laws. In the case of Telex Corp. v. IBM Corp. *supra* at 927, we specifically noted that § 2 of the Sherman Act should not be construed "to prohibit price changes which are within a 'reasonable' range, up or down." Although this statement points to the correct result in this case, it still leaves something to be

desired. There is no indication of when downward price changes cease to be "reasonable." Even in the situation presented here, the price could be set so low that it should be considered predatory.

The proper identification of predatory pricing has [18] recently been a subject of controversy. The discussion has focused on the employment of marginal cost as the floor below which prices should be considered predatory. In *Predatory Pricing and Related Practices under Section 2 of the Sherman Act,* 88 Harv. L. Rev. 697 (1975), Professors Areeda and Turner argue that any price above a firm's marginal cost, or in the alternative its average variable cost, should be conclusively presumed lawful. Any price below that level should be conclusively presumed unlawful. However, in Scherer, *Predatory Pricing and the Sherman Act: A Comment,* 89 Harv. L. Rev. 869 (1976), the author takes issue with the short-run cost approach. Scherer contends Areeda and Turner's proposed rule would permit anticompetitive pricing inconsistent with long-run welfare maximization. He recommends that courts continue to inquire into the monopolist's subjective intent and that several long-run variables be considered in determining whether the monopolist's conduct is anticompetitive.[8]

We believe that evidence of marginal cost or average varable cost is extremely beneficial in establishing a case of monopolization through predatory pricing. The relationship of a firm's price and its marginal cost is regarded as the best indicator of the competitive health of an industry. Samuelson, *supra* at 438; C. McConnell, *Economics* 446-448, 464 (3d ed. 1966). As an indicator of preda-

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8. Scherer lists several long-run variables at page 890 which we need not repeat here. These primarily concern whether the monopolist will be able to restrict output, reap monopoly profits, and leave residual demand unsatisfied, and whether the monopolist may become so entrenched through barriers to entry that it can never be dislodged. Areeda and Turner reject Scherer's long-run factors as a potential test for unlawful predation on the ground they are inherently speculative and indeterminate. Areeda & Turner, *Scherer on Predatory Pricing,* 89 Harv. L. Rev. 891 (1976). Scherer replies in *Some Last Words on Predatory Pricing,* 89 Harv. L. Rev. 901 (1976). [19]

tory pricing, marginal cost is extremely valuable because: "There is no reason consistent with an interest in efficiency for selling a unit at a price lower than the cost that the seller incurs by the sale." Posner, *Exclusionary Practices and the Antitrust Laws,* 41 U. Chi. L. Rev. 506, 519 (1974).

In the present case, the trial court specifically found that AMPOT's sales were always at prices above average variable cost and "contributed to the company's cash flow." These prices also were above AMPOT's marginal cost. AMPOT never reached its shutdown point—the point at which it would incur greater losses by operating than by shutting down. Under the circumstances, selling at these prices was rational, competitive behavior. [20]

Although we do not intend to adopt a solely cost-based test, there are no other relevant factors indicating AMPOT's conduct was anticompetitive even in the long run. The low prices for A/P persisted into the long run (a period of nearly seven years), and the industry's problems were resolved only by the imposition of external controls in the interest of national defense. The evidence shows this is not a case of short-run price cutting designed to secure monopoly profits in the long run. *See* International Air Indus., Inc. v. American Excelsior Co., 517 F.2d 714 (5th Cir. 1975), *cert. denied*, ... U.S. ..... There is nothing in the record to warrant a finding that AMPOT engaged in predatory pricing.

We turn now to the trial court's finding that AMPOT also violated the price discrimination prohibition of the Robinson-Patman Act, 15 U.S.C. § 13(a).[9] The discriminatorily low price was found in the sales to the large-volume buyers which we

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9. 15 U.S.C. § 13(a) provides in pertinent part: It shall be unlawful . . . to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . . [21]

have been discussing up to this point. There also existed a number of small-volume purchasers constituting a relatively small percentage of the total A/P market.[10] To these purchasers, both AMPOT and PE sold on the basis of published price schedules rather than secret bids. These prices were higher than the competitive bid prices. In 1968, the only year for which the trial court made specific findings, AMPOT's schedule prices varied from 18.62 cents a pound on orders of 100,000 pounds or more to 32.5 cents for orders under 2,000 pounds. In the same year, AMPOT's bid prices to the major purchasers were from 16 to 18 cents a pound. The price difference could not be cost-justified because AMPOT produced all its A/P in a continuous process and made all sales from accumulated inventory. AMPOT dominated the small-sale market primarily because PE made only nominal efforts to compete for this business.

Based on its finding that AMPOT's competitive bid prices were predatory, the trial court found the price discrimination gave AMPOT "an illegal 'edge' in its ability to undercut PE" which supplied the necessary element of injury to competition. This edge was found to be "slight" but "not insubstantial." We disagree with the court's conclusion that the evidence established injury to competition.

Some cases suggest discriminatorily low prices might be considered a violation of the Robinson-Patman Act on facts which would not establish predatory pricing in violation of § 2 of the Sherman Act. *See* Areeda & Turner, *supra,* 88 Harv. L. Rev. at 726. As it applies to the primary-line injury in this case, the Robinson-Patman Act should be interpreted no differently from the Sherman Act. The Supreme Court has admonished that the Robinson-Patman Act should be reconciled "with the broader antitrust policies that have been laid down by Congress." Auto-

10. The trial court never made findings as to what percentage of total sales this group represented or what buyers constituted the group. [22]

matic Canteen Co. v. FTC, 346 U.S. 61, 74 (1953). However, we perceive no substantial conflict. The primary-line decisions have consistently emphasized the element of predation. Utah Pie Co. v. Continental Baking Co., *supra* at 696 n.12, *citing* FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 548 (1960).

The reasoning employed by the trial court in finding injury to competition has been referred to as the "double inference test." International Air Indus., Inc. v. American Excelsior Co., *supra* at 723. From below-cost pricing, predatory intent is inferred; from the finding of predation, injury to competition is inferred. *See* Continental Baking Co. v. Old Homestead Bread Co., 476 F.2d 97, 104 (10th Cir. 1973), *cert. denied*, 414 U.S. 975. It follows that if the first inference is lacking, there is no basis for the second. [23]

We have held that AMPOT was competing on the merits; its prices were not predatory. The fact that AMPOT was charging higher prices in another submarket does not change its legitimate competition into an injury to competition. Areeda & Turner, *supra*, 88 Harv. L. Rev. at 727; *see* Telex Corp. v. IBM Corp., *supra*. Although PE may have been at a disadvantage because it was not competing effectively in the high-price submarket, that does not establish the injury to the health of the competitive process with which the Robinson-Patman Act is concerned. Atlas Building Products Co. v. Diamond Block & Gravel Co., *supra;* Anheuser-Busch v. FTC, 289 F.2d 835 (7th Cir. 1961).

We realize that our ruling leads to the somewhat untoward result that the larger of two competitors will survive while the smaller may expire. Bigness, however, is not a disqualification to compete. The Seventh Circuit made the point rhetorically in Anheuser-Busch v. FTC, *supra* at 843 n.12:

> If bigness be a disqualification for a firm to compete, interesting collateral questions arise, such as, how small does a company have to be before it has the right to enter

> into price competition with its competitors? And how large does it have to be before it must stop competing in price?

The Robinson-Patman Act was intended to provide small businesses with protection from abuses by large, powerful business, [24] but legitimate price competition is not such an abuse. "[N]either the Act nor any social value compels the sheltering of an individual competitor, at the expense of the public interest, from the competitive process." International Air Indus., Inc. v. American Excelsior Co., *supra* at 721, *accord*, Atlas Building Products Co. v. Diamond Block & Gravel Co., *supra* at 956.

Finally, we must consider AMPOT's appeal from the dismissal of its counterclaims. The only point urged on appeal is that an alleged agreement between PE and two major A/P purchasers to give PE "stay alive" orders constituted a group boycot [sic] illegal *per se* under Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959). We need only note that the findings of fact which defeat the group boycott claim are not clearly erroneous. F.R. Civ. P. 52(a).

The judgment is reversed insofar as it holds AMPOT liable for violations of the Sherman and Robinson-Patman Acts. The judgment is affirmed as to the dismissal of AMPOT's counterclaims. [25]

Appendix B

[¶ 75,054] Pacific Engineering & Production Co. of Nevada v. Kerr-McGee Corp. and Kerr-McGee Chemical Corp.

U.S. District Court, District of Utah, Central Division. No. C-40-70. Filed March 4, 1974.

Clayton, Sherman and Utah Unfair Practices Acts

Relevant Product Market—Cross-Elasticity of Demand—Government-Qualified v. Nonqualified Products—Government Bid Products v. Price Scheduled Products.—The relevant product market for an attempted monopoly case involving ammonium perchlorate (used in rocket fuel) was all of the market, rather than two markets, one of government-qualified A/P for customers who purchased in large volume in connection with the manufacturing of missiles for the Department of Defense and who purchased the product based on a government-required competitive bidding procedure, and a second market consisting of non-qualified A/P sold to customers who purchased in quantities of 100,000 pounds or less and who purchased at list price without competitive bidding. The requisite cross-elasticity of demand existed between the plaintiff's non-qualified product and the defendant's exclusively qualified product, and they competed. It was appropriate to note the fact that one of the defendant's main contentions was that it could not raise the price of its product for fear of losing business to the nonqualified product. As for the scheduled sales, while the plaintiff may not have achieved as much success as it desired, the company certainly was competing for this business, so that it had to be included in the market along with the government sales. See ¶ 760.

Attempt to Monopolize—Intent—Proof—Below-Cost Sales—Forward Pricing—Dumping—Sales Predictions.—The requisite element of an attempted monopoly in the ammonium perchlorate field, intent, was established by evidence of below-cost sales, notwithstanding defensive price reductions, forward pricing activities,

a "dumping" incident, and predictions of market sales indicating that the company's goal was to capture the entire market. See ¶ 770.

Monopoly—Market Shares—Power to Control Prices.—Monopoly could be inferred from market shares in a five year period of 53.5% (not allowing an inference), 80%, 88%, 67% (close, but allowing the inference) and 78%. Percentages, however, were not necessary. It was found that the company had the power to control prices, using its vast financial resources to subsidize below-cost pricing, and having the power to raise prices as established by the fact that the plaintiff would have followed any price increase as long as it would have allowed the firm a profit. See ¶ 755.

Combination and Conspiracy—Parent and Subsidiary—Subsidiary's Deception of Individual Link Between Firms.—Charges of conspiracy between related companies were rebutted by the plaintiff's own contention showing, if anything, that the individual who was the major link between parent and subsidiary was deceived by those in effective control of the subsidiary, indicating that there could not possibly have been any agreement express or implied between the two companies. See ¶ 725.

Price Discrimination—Applicability—Government as Ultimate Consumer.—The proposition that sales to private parties are exempt merely because the ultimate consumer is the government was rejected. Since the government as ultimate consumer would benefit by vigorous competition among those it buys from and their suppliers, no public policy would be served by such an exemption. See ¶ 3275.

Price Discrimination—Like Grade and Quality—Customer Usage—Purpose of Specifications—Seller's Pricing.—Two broad grades of ammonium perchlorate (rocket fuel) each constituted products of like grade and quality, rather than separate specifications within them. There was no substantial difference in functional customer usage of the product. The desire for particular

specifications was more the result of a desire for reproducibility rather than any initial desire for a "different" product than the broad classification. The seller's own course of conduct strongly suggested that a determination of like grade and quality was proper, since the price differences were not on the basis of differences in grade or quality but were based on differences in size of sales or the need for pricing to win a contract. See ¶ 3245.

Price Discrimination—Like Grade and Quality—Physical Differences.—Although two FTC cases supported the proposition that physical differences probably remove differential pricing from the reach of the Robinson-Patman Act, neither case holds that *any* physical differentiation is sufficient to eliminate comparisons under the like grade and quality test. In both cases there were considerably more substantial differences in the compared products than in the products in the instant case. See ¶ 3245.

Price Discrimination—Defenses—Absence of Competition Between Plaintiff and Defendant on Differentiated Goods.—The defense that higher prices charged small-volume buyers did not violate the Robinson-Patman Act because the plaintiff did not compete for the small-volume business was rejected as unsupported by law and fact. Legally, it is irrelevant whether or not the plaintiff competed for the small-volume business, since the most common type of price discrimination claim is that the defendant raised prices on the same goods in areas where there was no competition in order to support lower prices where there was competition; competition is only required on one "end" of the price differentiated sales in order for there to be competitive injury and a violation of the Act. See ¶ 3315.

Price Discrimination—Defenses—Availability of Quantity Discounts.—The defense that quantity discounts were available to all customers provided they ordered sufficient quantities was legally unsupportable. See ¶ 3380.

Price Discrimination—Competitive Injury—Subsidization of Below-Cost Sales.—Price discrimination favoring large-volume buy-

ers were a cause of injury to the plaintiff, since the higher profits gained from the small-volume sales would necessarily have given the defendant an illegal edge in its ability to undercut the plaintiff on larger-volume schedule sales and large-volume bid sales. The edge contributed substantially to the defendant's ability to undercut the plaintiff's prices and to hold the sales price of large-volume materials at a below cost level. See ¶ 3300.

Price Discrimination—Variances in Below-Cost Prices.—Variances in below-cost prices were not violative of the Robinson-Patman Act because it was the below-cost aspect of the prices, not the variances, that caused competitive injury. See ¶ 3300.

Sales Below Cost—Applicability to Retailers and Wholesalers —Inapplicability to Manufacturers.—A manufacturer's sales below cost to a Utah customer would not violate the Unfair Practices Act, since the Act does not apply to manufacturers. See ¶ 6641.47.

Price Discrimination—Defenses—Injury to Monopolist.—Although plaintiff in a monopoly case engaged in price discrimination, this did not involve competitive injury, in light of the findings as to the defendant's attempt to monopolize, monopoly power, and price discrimination, a showing of injury would be difficult. The plaintiff may have taken some of defendant's business. "But the effect of taking business from a monopolist is not 'substantially to lessen competition, or tend to create a monopoly in any line of commerce . . .' Indeed it has the opposite effect." (The court noted that it expressed no opinion as to whether the plaintiff would be able to defend against buyers who suffered.) See ¶ 3300, 3315.

Refusal to Deal—Boycott—Dual Sourcing.—Arrangements under which two companies undertook dual sourcing to include purchases from a particular company did not constitute a group boycott directed at the other supplier in the field. As for the boycott theory, a firm agreement did not exist, the allegedly excluded supplier was not forced by the arrangements to charge lower

prices (as demonstrated by a finding that the firm had the power to raise prices), the facts differed from *Klor's* in that there was no dominant economic power trying to drive a small competitor out of business, the purchasers were free to deal with the complaining supplier and to negotiate the price paid for the alleged beneficiary of the questioned arrangements, and even if the customers intended to follow the policy of dual sourcing there was nothing to compel them to do so. The governing law is contained in *Seagram* (CA-9, 1969, 1969 TRADE CASES ¶ 72,914). There was no evidence of anticompetitive motives. See ¶ 2450.

Exclusive Dealing—Customers' Dual Sourcing—Requirements Contract.—Arrangements under which two companies undertook dual sourcing to include purchases from a particular company did not constitute illegal exclusive dealing by requirement contract with respect to the other supplier in the field. The situation differed from *Tampa Electric* in that it included more than just a single buyer and a single seller. Also, the policy did not operate as a requirement contract because there were not any enforceable contracts requiring the customers to purchase from the seller. See ¶ 2920.

For plaintiff: C. Keith Rooker and Richard W. Giauque (Van Cott, Bagley, Cornwall & McCarthy, on brief), Salt Lake City, Utah. For defendants: Peter W. Billings, Alfred J. Colton and Stanford B. Owen (Fabian & Clendenin, on brief), Salt Lake City, Utah, Willard P. Scott and Thomas R. Cochran (of counsel), Oklahoma City, Okla.

Opinion

HOFFMAN, D. J.: The controversy in this private anti-trust action pertains to the ammonium perchlorate (A/P) industry. The plaintiff, Pacific Engineering & Production Co. (PE), and Kerr-McGee Chemical Corporation, one of the defendants herein,

were, at the time this action was tried, the only producers of A/P. Prior to 1958 Western Electrochemical Company (Wecco) and its successor, American Potash and Chemical Company (AMPOT), were the only producers of this product. In 1958 H. E. F. (Hooker), a joint venture between Hooker Chemical Company and Foote Mineral Company; Pennwalt Corporation (Pennwalt); and PE all entered the industry as producers in competition with AMPOT. Later AMPOT was acquired by Kerr-McGee Corporation through the medium of a new subsidiary, American Potash and Chemical Corporation, and, a few years thereafter, Kerr-McGee Chemical Corporation, a wholly owned subsidiary of Kerr-McGee Corporation, took over the AMPOT operations. For convenient reference, unless otherwise designated, we will refer to the defendants as AMPOT.

Before 1958 the price of A/P was in excess of 40 cents per pound. When competition entered the field, combined with other developments, the price of A/P declined, at times very rapidly, until it was selling at between 15 and 20 cents per pound during March, 1966, and through December, 1970, which is the damage period involved in the present action.

This opinion deals only with the liability. Damages have been deferred for further consideration.

The Product

A/P is an oxidizer which is used primarily in solid fuel propellants for military and NASA rockets. It is also used to a lesser degree in explosives and pyrotechnics. The chemical constitutes slightly over two-thirds of the contents of the propellant in a solid fuel rocket. At the present time, A/P is the best oxidizer available for rocket motor programs. The majority of A/P is manufactured and sold as Class I (nominal 200 micron size—"standard") or Class II (nominal 400 micron size—"coarse").

Each rocket motor manufacturer to whom PE and AMPOT sell the bulk of their production has its own government approved

specifications for the components of the products which it manufactures. These specifications vary as to the different properties required of the A/P. The A/P used in these motors and rockets must meet these specifications and, in addition, must be qualified for the program. To become qualified the A/P must undergo several tests. These tests range from simple lab scale ballistic and physical tests to static test of loaded rocket motors. AMPOT's products are qualified for most of the missile programs, while PE's are not.

The main differences in the manufacturing process used by AMPOT and PE are in the annodes used in part of the process,[1] the character of the first two steps[2] and the operating conditions in the third step.

The Parties

1. *The Plaintiff*—PE was organized in November, 1955, in the State of Nevada by Fred D. Gibson, Sr., Edgar Marston, and John Mueller. Gibson was president from the creation of the company until 1966. He, as well as most of the other members of PE's staff, were former officers or employees of Wecco, the predecessor of AMPOT.

In 1958 PE began construction of a pilot plant at Henderson, Nevada. This plant was to test the feasibility of manufacturing A/P using the company's new process. In 1959 the plant's capacity was expanded to approximately 5,000,000 pounds of A/P per year. The plant was further enlarged in 1961, and the final capacity became 11,500,000 pounds per year if PE manufactured its own sodium chlorate, and 20,000,000 if the company purchased sodium chlorate elsewhere.

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1. PE uses lead dioxide annodes, whereas AMPOT uses graphite annodes in the first step and platinum in the second.

2. AMPOT uses a continuous process while PE produces on a batch basis.

A loan of over $2,000,000 from American Cyanamid made the 1961 expansion possible. This loan was to be paid beginning with a balloon payment of $1,100,000 in January, 1966. It was secured by a deed of trust on the majority of PE's property. American Cyanamid was allowed two representatives on PE's board of directors, and also received an option to purchase either PE's assets or common stock. In 1964 American Cyanamid's representatives resigned from the board and the company released its option for reasons hereinafter mentioned.

PE was unable to meet the loan payments and, on March 16, 1966, American Cyanamid instituted a suit in the United States District Court for the District of Nevada to foreclose its deed of trust. In the same year, a group of PE's stockholders filed a petition in the district court for a reorganization of the company under Chapter X of the Bankruptcy Act.

These critical financial problems were resolved in March, 1967, when PE obtained a $500,000 Small Business Administration guaranteed loan from the First National Bank of Nevada. The proceeds were paid to American Cyanamid who then subordinated the balance of its debt to the bank loan.

In 1968 PE defaulted in the performance of its revised obligations to American Cyanamid and its obligation under its 1967 bank loan. Plaintiff raised $450,000 by an intrastate stock offering at $1.00 per share and the advance of $300,000 by Raymond Knisley. Knisley then used the entire $450,000 to buy the American Cyanamid note and then forgave the balance of the debt reducing the principal to $300,000.

PE discharged its obligation to the First National Bank, Knisley, and other creditors with the proceeds from a public offering. This registered offering was conducted from February 3-27, 1970, and raised approximately $1,555,000.

Since 1958, A/P has been PE's primary product and provided the majority of the company's revenues. The company showed a profit in the years 1960-64 and a loss in the years 1965-70.

2. *The Defendants*—Wecco was the first producer of A/P. In the early 1940's the company was founded to produce various perchlorates for experimental work in rocket propellants. In the middle 1940's a part of a government-owned electrolytic basic magnesium plant at Henderson, Nevada, was converted into a potassium perchlorate plant, and Wecco became the operator. In 1951 the company purchased this plant from the government.

1951 was also the year in which Wecco began building an A/P plant at Henderson. This plant was built for and owned by the Navy, and it became operational in 1953. Wecco operated the plant under contract with the Navy.

Commencing in 1954 American Potash and Chemical Company (OLD AMPOT) began negotiations concerning a merger with Wecco. This merger was completed by a series of transactions which occurred in 1954 and 1955. F. D. Gibson, a director and stockholder of Wecco, and Edgar Marston, Wecco's largest stockholder, initially opposed the merger, but finally sold their stock to AMPOT. Shortly after this merger, Gibson left OLD AMPOT and devoted his full time towards PE's activities. After the merger was completed, OLD AMPOT continued to operate the A/P plant for the Navy. In 1961 the government offered the plant for sale and, in 1962, AMPOT purchased it for slightly over $5,000,000.00.

On December 31, 1967, AMPOT was acquired by Kerr-McGee Corporation under a statutory merger proceeding which was a stock for stock transfer. By the terms of the merger, a wholly owned subsidiary of Kerr-McGee Corporation took over all assets and assumed all liabilities of AMPOT. The new subsidiary was named American Potash and Chemical Corporation (NEW AMPOT). In October, 1970,[3] fertilizer and non-fuel mineral opera-

3. Kelly, President of Kerr-McGee Corporation, testified that the consolidation occurred in 1969, but Kerr-McGee's 1970 Annual Report states the consolidation was effective October 1, 1970.

tions were combined with NEW AMPOT, and the new subsidiary was named Kerr-McGee Chemical Corporation.

This subsidiary continued to produce A/P until the spring of 1971 when Kerr-McGee announced it was closing its A/P plant. On September 1, 1971, the government held separate meetings with both PE and NEW AMPOT. These meetings were conducted at Norton Air Force Base, California, Headquarters, Space and Missile Systems Organization (SAMSO). As a result of these meetings, the government imposed a division of business by government contractors between both companies at prices which would yield them a potentially reasonable profit and the operation of Kerr-McGee Chemical Corporation continues.

Other A/P Producers

Hooker Chemical Company (Hooker)

Hooker is a large industrial chemical company located within the United States. Among other products, it produces sodium chlorates at a plant in Columbus, Mississippi. In 1958 Hooker and Foote Minerals Company formed a joint venture named H. E. F., Inc. H. E. F. was created in order to develop the capability to produce A/P at Columbus. The company began production in 1959. Due to its location, it had a freight advantage as to A/P shipments to the Southern and Eastern regions of the United States, and a disadvantage in shipments to the Western regions.

Hooker became the sole owner of the company in 1962 when it bought Foote's interest in the project. In early 1965, however, the company announced plans to close its A/P plant. The facility was mothballed in 1966, although in that year the company sold some A/P from existing inventories.

Pennwalt

Pennwalt Chemical Corporation is another large industrial chemical manufacturing and marketing company which entered the A/P field. The company is a major producer of sodium

chlorate at a plant near Portland, Oregon, and in 1958 the company (then Pennsalt) began a pilot plant for the production of A/P. This plant was gradually expanded until its capacity reached 12,000,000 pounds per year.

In early 1965 Pennsalt terminated most of its A/P production although it sold A/P from inventory until 1967.

Consumers of A/P

As previously mentioned, the primary use for A/P is as an oxidizer in solid fuel propellants for military and NASA rockets. Therefore, the ultimate consumer is the United States, and the Government determines what quantity of A/P will be purchased in any given year. Additionally, the procurement of A/P which is sold to the armed services is governed by the Armed Services Procurement Regulations. The actual purchase of A/P, however, is made by the companies producing the products in which the A/P is used. Although there are several of these companies, we are basically concerned with the three largest which are hereinafter described.

1. *Thiokol Chemical Corporation (Thiokol)*

During the 1960's Thiokol was the largest user of A/P. Its corporate headquarters are at Bristol, Pennsylvania, and it has five divisions which use A/P. These are Wasatch at Promontory, Utah; Longhorn at Marshall, Texas; Huntsville at Huntsville, Alabama; Elkton at Elkton, Maryland; and Georgia at Woodbine, Georgia. The main projects for which the company used A/P were the Minuteman and Poseidon missile programs.

2. *Aerojet General (Aerojet)*

Aerojet is a subsidiary of General Tire and Rubber Company, and its A/P plant is located near Sacramento, California. Its main use of A/P involved the 260-inch motor, Polaris and Minuteman programs.

3. *United Technology Center (U. T. C.)*

U. T. C. is a subsidiary of United Aircraft, and its A/P plants are located at Sunnyvale and Coyote, California. The main use which the company made of A/P was in the Titan III—C and D program.

Summary of Pricing in the A/P Industry

Wecco began the production of A/P in 1948; however, its sales volume did not begin to grow until 1950. Sales then grew to approximately 7,000,000 pounds yearly for the years 1954-57. The price of A/P during this period was above 40 cents per pound.

From 1958, immediately after AMPOT's three competitors entered the market, until 1961 the price declined to the 32-35 cents per pound level. From 1962-64 the price further declined until it was between 20-26 cents per pound. This trend continued in 1964 when PE received a U. T. C. order for 11,550,000 pounds at 19.25 cents per pound, and in 1965 when AMPOT bid 16.4 cents per pound on a large procurement at Thiokol Wasatch. Prices continued to decline and, during the damage period when PE and AMPOT were the only A/P suppliers, the price fluctuated between 15 and 20 cents per pound. The prices during the damage period were below fully allocated cost for both companies.

PE claims AMPOT's actions were unlawful and were responsible for the drastic decline in the price of A/P. The plaintiff maintains these actions were responsible for the following:

1. Violations of Section 2 of the Sherman Act—
   a. Monopolization of the A/P market.
   b. Attempt to monopolize the A/P market.
   c. Conspired to monopolize trade and commerce in the A/P market.
2. Violation of Section 1 of the Sherman Act by conspiring and combining to monopolize the A/P market.
3. Violation of Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act.
4. Violation of the Utah Unfair Practices Act.

Defendants counter with accusations that PE's actions violated the following:

1. Section 10(b) and Rule 10(b) 5 of the Securities Exchange Act of 1934.

2. Section 1 of the Sherman Act by conspiring illegally to restrain trade, and Section 3 of the Clayton Act.

3. The Robinson-Patman Act.

Factual Evidence Concerning the Monopoly and Attempted Monopoly Charges

The following facts are those which we have found proven by the evidence and relevant to PE's charges of monopoly and attempted monopoly and AMPOT's defenses to these claims.[4] We will first discuss PE's evidence and then AMPOT's although, where appropriate, AMPOT's contentions will be included with those of PE and vice versa. Even though we will defer a discussion of our findings concerning these claims until all of the facts have been presented, when it is convenient to do so, we will resolve the conflicting interpretations of the evidence within this section.

A. The following facts are those which PE relies upon to establish AMPOT's predatory intent and monopolistic practices.

1. *Market Forecast and Intent to Achieve all Existing Business.*

One of the basic elements of PE's claim is that AMPOT's[5] predatory intent can be seen by examining the actions of AMPOT's employees. These employees frequently made projections of future sales of A/P. Three of these are relevant on the attempted monopoly claim.

The first can be found in a memo from Schnier, AMPOT's Manager of Chemical Fuel Sales 1965-66, to Francis, AMPOT's

4. Where appropriate we will include additional facts within our conclusions of law.

5. Although the primary defendant is now Kerr-McGee Chemical Corporation, where appropriate the name AMPOT will be used.

Vice-President in Charge of Marketing. This memo contained a prediction that PE would receive only 45 tons of new A/P orders in 1966. The existing business which was credited to PE was the result of a 1964 contract with U. T. C. originally for 5,750 tons of A/P. This contract called for shipments to begin in December, 1964 and continue for 17 months.

The second projection is contained in a memo from Campbell, a member of AMPOT's Sales Department, to O'Brien, Director of Field Sales. This memo was written in October, 1967, and contained a prediction that in 1968 the total sales of A/P would be 11,738 tons and that AMPOT would sell 9,328 of them. This indicates that Campbell felt the company would have over 78% of the market in 1968.

The last projection is a graph made in July, 1968, by Jenny, Manager of AMPOT's Chemical Fuel Department. Jenny's prediction was that PE would sell 3,000 tons of A/P per year in the years 1968 through 1970, with 2,000 of the foregoing coming from PE's second long term contract with U. T. C. This contract called for PE to supply U. T. C. with up to 9,755 tons of A/P from the second quarter of 1968 through the second quarter of 1971. Jenny predicted that the rest of the sales in the A/P industry, which he felt would amount to 8,000 tons each year, would be awarded to AMPOT. Jenny thus was predicting that AMPOT would sell over 70% of all A/P sold.

Jenny justified his projections on the basis that, if they were accurate, both AMPOT and PE would be operating at 50% of their capacity. He hoped his calculations were correct and that AMPOT would sell this tonnage. His position reflected the company's attitude which was to obtain as much business as possible so that its plant would remain in a viable operating condition. Standing alone, of course, there is nothing unlawful in attempting to obtain as much business as possible.

In 1969, after AMPOT lost two competitive bids to PE, Jenny's figures were revised downward to 5,339 tons of A/P sales for

AMPOT. As a result of this loss of business, AMPOT established a new policy of reviewing each bid prior to submitting it. It was hoped that this policy would enable the company to obtain as much business as possible. It seemed to be successful as, in June, 1969, O'Brien wrote Jenny's superior that AMPOT had not lost any business since the new policy took effect.

As far as intent to achieve all existing business is concerned, AMPOT priced its A/P in order to obtain as much business as it could up to its productive capacity.[6] In addition, when AMPOT was not selling to a company such as U. T. C., it would make that company a target account in order to try to obtain that business. This policy, together with the actions of the company's employees, establishes PE's claim that AMPOT desired to obtain as much of the existing A/P business as possible.

2. *Major Sales of A/P Were Below Cost.*

Another aspect of PE's claims is that AMPOT sold its A/P below cost[7] for the entire damage period in order to drive PE out of business. The evidence establishes that AMPOT did submit bids on all major procurements during the damage period at prices below its fully allocated cost. In addition, the majority of

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6. This capacity in later years was apparently more than the market capacity.

7. Although many types of cost were discussed at trial, there are three which the court considers significant. These are manufacturer's cost, out-of-pocket cost, and fully allocated cost. We will accept defendant's definitions of these costs. These are as follows:

(a) Manufacturer's cost—The fully allocated cost at Kerr-McGee's Henderson plant without the addition of general corporate overhead and selling expenses;

(b) Out-of-pocket cost—The cost necessary to produce the product which does not take into account plant depreciation, interest on debt, or any of the corporate overhead or selling expenses. This cost does, however, include labor, maintenance labor, and the cost of chemicals and electricity;

(c) Fully allocated cost—The full cost of manufacturing and selling the product.

sales made pursuant to these bids were also below the company's manufacturing cost.[8] All of AMPOT's sales, however, were above its out-of-pocket cost and contributed to the company's cash flow.

As might be expected, AMPOT's officers knew the cost of manufacturing and selling A/P. As early as 1963 one of the company's cost accountants prepared two graphs which showed the company's fully allocated cost and the suggested selling price. There [sic] graphs revealed the following:

Volume of A/P	*Fully Allocated Cost— Cents Per Pound*	*Suggested Selling Price Cents Per Pound*[9]
8½ tons	26.1	31.0
10 tons	23.7	28.9
12 tons	22.1	27.0
14 tons	21.0	25.6

It is quite likely that these figures are accurate since AMPOT bid on major sales of A/P during the year 1963 at between 25 and 30 cents per pound.

Further evidence of AMPOT's awareness of the cost of A/P is illustrated by a pro forma statement of manufacturing cost which was submitted to Stanford Research in September, 1965 by AMPOT's Vice-President in Charge of Finances and Administration. According to this statement,[10] the cost of A/P was between 25 cents per pound at a 4,500 ton capacity and 15.92 cents per pound at a 13,500 ton capacity.[11]

Internal communications among AMPOT's officers indicate the company not only knew the cost of A/P but realized the price had become greatly depressed. In fact, the price was so depressed that AMPOT's treasurer did not make an effort to determine

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8. AMPOT's schedule or drug store sales were, however, always sold at prices equal to or above fully allocated cost.

9. This price includes an 18% pre-tax profit.

10. At trial Kerr-McGee claimed this statement was hypothetical.

11. This capacity was never obtained during the damage period.

the full complete cost of A/P. He felt this would only be academic since the manufacturing costs were considerably in excess of the sales price. Additionally, in January, 1967 a proxy statement and prospectus issued by AMPOT in connection with its merger with Kerr-McGee stated that the price received for A/P in recent years had been below cost.[12]

Although AMPOT did not reveal its exact cost for the years during the damage period, PE presented an expert who reconstructed AMPOT's fully allocated cost and revealed them to be as follows:

Year	Cents Per Pound
1965	29.37
1966	21.64
1967	19.32
1968	21.81
1969	21.53

When these costs are compared with AMPOT's bids on procurements of 250,000 pounds of A/P or more, [13] which during the damage period ranged between approximately 15 to 20 cents per pound with the majority below 18.5 cents per pound, it can be clearly seen that AMPOT was selling its A/P at prices far below cost.

Perhaps the clearest evidence that AMPOT set its pricing policies with full knowledge that its price was below cost can be found in an internal memo which was sent to AMPOT's Vice-President in Charge of Finances and Administration on June 10, 1965. This was the day before AMPOT submitted a bid of 15 cents per pound on a multi-year procurement at Thiokol-Wasatch. The memo was a voluntary non-routine memo prepared by Cable,

12. This reference was to fully allocated cost.

13. This figure was chosen by Kerr-McGee's expert as one which represented major sales.

administrator of government contracts and special financial analyst, and must be accepted as such.

In this memo, Cable made the following four assumptions:

1. The costs of producing A/P are approximately equal within the industry;
2. A/P consumers are interested in maintaining two sources;
3. Pennwalt (Pennsalt) will not actively compete for business at the present price levels; and
4. Present price levels for A/P will not give PE a profit and probably will not cover all of its cost.

After these assumptions, Cable posed the question of whether PE was getting the same price as AMPOT or whether it was being maintained as an alternate source and receiving a share of the A/P business regardless of its price.

He then observed that, if PE was getting the same price as AMPOT, it had a limited life expectancy and, if so, its facilities would only be of interest to a consumer of A/P. Acquisition by a consumer, Cable pointed out, would be a depressing influence on the price of A/P and undesirable. He further observed that, if PE was getting a higher price, AMPOT could raise its price to the level of PE without affecting its share of the market.

The conclusion reached in this memo was that, since the company must share the market with PE, either as a going concern or a captive capacity, AMPOT should price its A/P on that expectation rather than one of forcing PE to shut down. He added, however, that the company's price should be set low enough to discourage Pennwalt's (Pennsalt's) resumption of production.

In spite of this analysis, AMPOT bid 15 cents per pound and accepted a total loss of 13.4 cents per pound based on its fully allocated cost. Although this bid has been pointed to as crucial due to PE's claim that it represented a new step in the low pricing of A/P, it is not as important for this reason[14] as it is to show

14. We do not choose to give great weight to this particular bid due to the fact that its effect on pricing was minimal because of the extremely

that officials of AMPOT were aware that PE was facing bankruptcy if the price of A/P remained below cost.

AMPOT's below cost pricing policy resulted in heavy financial losses for the years 1965-1969. These losses were as follows:

Year	Loss
1965	$458,092.00
1966	$362,131.00
1967	$210,676.00
1968	$328,625.00
1969	$247,560.00[15]

As will be discussed in detail *infra*, AMPOT argues it was forced to sell A/P at these low prices due to the tactics of the rocket motor manufacturers and the conditions existing in the industry. However, the net result of AMPOT's pricing policies can be seen by analyzing one of its exhibits. This exhibit lists the competitive bids of A/P at volumes above 250,000 pounds which resulted in procurements for the years 1961-1971. This study reveals the following:

(a) Between June, 1963 and October 1964, when the price of A/P was above 20 cents per pound, PE and AMPOT were obtaining a similar number of awards;

(b) From January, 1965 through February, 1966, when the price of A/P fell below 20 cents per pound, PE did not obtain any major awards and it only obtained one during the remainder of 1966;

(c) During the period from March through December, 1966, AMPOT received six awards;

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long period of time during which the prices were depressed. Even though this bid probably did reduce the price of A/P to new levels it was basically a continuation of an existing situation.

15. It should be noted that these losses take into account the "drug store" sales which were sold on a profitable basis.

(d) In 1967, PE received five awards while AMPOT received seven or eight.

(e) In 1968, when PE was bidding 2 to 3 cents per pound higher than AMPOT, PE received one award and AMPOT fifteen or sixteen.

(f) In 1969 PE received three awards and AMPOT six.

(g) In 1970 PE received three awards and AMPOT four.

Although these figures represent numbers and not volume, they are fairly indicative of the percentages of the A/P business which each company received. These percentages are as follows:[16]

Year	PE	AMPOT
1966	27.0	53.5
1967	19.0	80.0
1968	12.0	88.0
1969	33.0	67.0
1970	22.0	78.0

3. *AMPOT's Broad and Continuous Surveillance of PE*

Another aspect of PE's claims is that AMPOT's surveillance of PE is indicative of its predatory intent. The evidence shows that AMPOT conducted detailed investigations of PE's operations and activities. Although these investigations took several different forms, there are two which are most significant.

The first is AMPOT's scrutiny of PE's relationship with American Cyanamid. The interest in this relationship was due to the fact that PE had borrowed over $2,400,000 from this company. The loan was secured by a trust deed, and PE's ability to repay it was questionable. AMPOT's investigation of this situation

16. All of these percentages except those for 1966 were supplied by AMPOT. PE's percentages indicate that AMPOT received a higher share of the market. The difference, however, is slight and we will consider the above figures as accurate. These percentages include sales of both qualified and nonqualified A/P since the claims are based on AMPOT's attempt to monopolize or monopolization of the entire market.

began as early as 1963 and intensified a few years later when American Cyanamid instituted suit to enforce PE's obligation.

AMPOT initially checked records in Nevada's state and federal courts to discover if an action had been filed. Once the suit was filed, AMPOT closely followed its progress. AMPOT's inquiry became so intense that the company asked two Nevada attorneys to keep track of the court files and inform the company of all developments in the case. The company's tactics were successful and, by early 1967, it had learned that PE worked out an arrangement with American Cyanamid whereby PE's debt was subordinated so that PE could obtain a $500,000 loan.

The second activity was the detailed surveillance of operations at PE's plant. This surveillance was carried out by Henry Curtis, the manager of AMPOT's Henderson plant. Curtis gathered information and sent it to his superiors. On several occasions he was told that his work was very valuable. His activities consisted of the following:

(a) A monthly check of the number of cars in PE's parking lot;[17]

(b) Checking on the movement of freight cars in and out of PE's plant by examining records in the freight office;

(c) Taking aerial photos of PE's plant on two or three occasions;

(d) Clipping articles in the local papers concerning PE's activities;

(e) Inquiring at the Colorado River Commission concerning PE's power consumption; and

(f) Encouraging his shipping foreman to inquire of truck drivers concerning shipments made to PE's plant.

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17. This check gave him a feeling for the number of employees working and allowed him to approximate PE's payroll and level of plant activity.

In addition to these activities, on one occasion a letter from a foreign country addressed to PE was deliverd to AMPOT by mistake. Curtis read through the envelope and saw that the letter contained a request for 100 pounds of A/P. He then made a Xerox copy of the envelope, passed the information contained in the letter to AMPOT's export salesman, and mailed the letter to PE.

This extensive surveillance was conducted only against PE, and Curtis was not instructed to cease these activities until sometime between one and three months prior to the taking of his deposition. AMPOT's evidence concerning this activity tends to support its claim that the surveillance was necessary in order for the company to be prepared to fill PE's A/P orders if PE should go out of business. We choose, however, to believe AMPOT's activities were far too extensive to be justified on this rationale and we believe that these activities are evidence of AMPOT's predatory intent. We agree that reasonable inquiries as to a competitor's activities are permissible, but AMPOT went beyond the rule of reasonableness.

4. *AMPOT's Efforts to Impair PE's Contract with U. T. C.*

In December, 1967 PE bid on a procurement of A/P at U. T. C. As a result of this bid in April, 1968 PE was awarded a blanket purchase order for up to 19,500,000 pounds of U. T. C.'s Class I A/P requirements for the Titan Rocket Motor Program. This A/P was to be supplied from May, 1968 through December, 1971 at a price of 17.94 cents per pound.

This award was one of the largest obtained by PE. As another aspect of its attempted monopoly claim, PE contends that AMPOT endeavored to induce U. T. C. to breach this contract. After the award, J. C. Schumacher, AMPOT's Vice-President in Charge of Manufacturing of Electrochemicals and Sales and Manufacturing of Rare Earth Products, and Freeman, AMPOT's A/P product manager, visited U. T. C. officials. During this visit Adelman,

U. T. C.'s President, was told that AMPOT was interested in selling a large quantity of surplus A/P. Adelman informed Schumacher and Freeman that U. T. C. had just purchased A/P from PE. In response, Schumacher stated that U. T. C. was not totally obligated to PE, and he asked if U. T. C. would be interested in A/P at a price of 9 or 10 cents per pound.[18]

After this meeting, Reddington, U. T. C.'s Manager of General Procurements, was asked to make inquiries concerning this surplus A/P. He called AMPOT's plant and was informed that AMPOT did not have a large supply of A/P on hand.

AMPOT's trial testimony indicates Schumacher took it upon himself to initiate this conversation with U. T. C. due to his personal animosity toward PE and its officers, and that AMPOT's sales department disavowed the offer when inquiries were made. Additionally, AMPOT's Vice-President in Charge of Sales told the company's marketing director that Schumacher did not have the authority to give U. T. C. a quotation. In essence, AMPOT admitted the episode but claimed that it was not responsible.

Although there may be some merit in AMPOT's response, we must consider the fact that this incident was carried out by one of the company's highest officers. Bearing this in mind, we find this incident does reflect predatory intent toward PE.

This finding is bolstered by a memo to file which was written by Jenny on February 17, 1970. The subject was a visit with Reddington concerning the sale of A/P. In a blind postscript to some of AMPOT's marketing people, Jenny stated that the seed of doubt had been placed, that perhaps a better price is available on the remaining U. T. C. requirement for regular A/P for use in the Titan 3-C program. This memo indicates AMPOT was attempting to obtain the business which U. T. C. had under con-

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18. At this time A/P was selling at a price of 15 to 20 cents per pound, and the price of 10 cents per pound was below AMPOT's out-of-pocket cost.

tract with PE and gives credence to PE's claim that Schumacher's visit was more than just an "unauthorized gambit."

5. *Destruction of PE's Small Business Administration Classification*

Another aspect of the attempted monopoly claim is that AMPOT was responsible for PE's losing its Small Business Classification. This classification meant that PE was entitled to small business set-asides on certain procurements and that PE was eligible for favorable Small Business Administration financing.

The evidence presented conclusively establishes that AMPOT interfered with PE's classification. In June, 1962 a bid which contained a small business set-aside was issued for a November procurement of A/P. At this time AMPOT protested PE's classification[19] and, as a result of this protest, PE waived its claim to the set-aside. PE took this action due to the time pressures generated by the procurement.

AMPOT remained concerned about PE's status and continued to complain to government officials. As a result of these complaints, it was determined that PE was not a small business for purposes of government procurements.

In September, 1963, PE decided to apply for reinstatement of its Small Business Administration classification and AMPOT again objected. This objection continued even after PE was reclassified as a small business.[20] AMPOT's final action concerning PE's classification occurred in late 1966 and early 1967 when AMPOT again investigated PE's status.

6. *AMPOT's Forward Pricing Would Vary in Response to PE's Financial Condition*

The last, and perhaps one of the most significant, of PE's claims which we have found relevant is that AMPOT's forward

19. The basis of this protest was that, as a result of its loan to PE, American Cyanamid had options on PE and officials on PE's Board of Directors.

20. This reclassification was due to American Cyanamid's release of its options on PE.

pricing would vary in response to PE's financial condition. On occasions, the rocket motor manufacturers would request the A/P suppliers to submit bids for future years. PE claims that AMPOT would lower these prices when it appeared that PE would remain a competitor and raise them when it appeared the company was about to collapse.

PE claims AMPOT began this pricing activity with its 15 cents per pound bid to Thiokol in 1965. This bid was the result of a meeting held on June 11, 1965. In attendance were three of AMPOT's top officers, and they set the price knowing that PE might default on its mortgage to American Cyanamid and be forced into bankruptcy. AMPOT quoted this price of 15 cents per pound through June, 1967; however, for fiscal years 1967 and 1968 the company stated that the price would be the price for fiscal year 1966, increased or decreased to equal fully allocated cost plus 6% profit. Since the 15 cent bid was well below AMPOT's fully allocated cost, the bids in fiscal 1967 and 1968 represented a considerable rise in the price of A/P.

In January, 1966 AMPOT bid the following to Thiokol:

Time Period	Cents Per Pound
January 1, 1967—June 30, 1967	15.00
July 1, 1967—December 31, 1967	23.29
January 1, 1968—December 31, 1968	23.99
Calendar Year 1969	24.71[21]

In this same month (January, 1966) AMPOT computed its cost at 20.25 cents per pound.[22]

In May, 1966 these high forward prices were lowered. As a prelude to this lowering, American Cyanamid had informed AMPOT

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21. These figures are based on certain volume levels but for our purposes these are not relevant.

22. This type of cost was not specified although it appears to be manufacturing cost.

that it had decided to delay bringing suit against PE. In addition, AMPOT also learned that Thiokol had awarded an order for 500 tons of A/P to PE. The new prices quoted were as follows:

Time Period	Cents Per Pound
January 1, 1967—June 30, 1967	15.00
July 1, 1967—December 31, 1967	15.75
January 1, 1968—December 31, 1968	16.50
January 1, 1969—December 31, 1969	18.15
January 1, 1970—December 31, 1970	19.97
January 1, 1971—December 31, 1971	21.97
January 1, 1972—December 31, 1972	24.17

The next event which affected forward pricing occurred on September 21, 1966, when American Cyanamid obtained summary judgment against PE. Paralleling this event was the fact that by October 6, 1966, AMPOT had learned that an involuntary petition in bankruptcy had been filed against PE. On November 30, 1966 AMPOT withdrew its May, 1966 quotes to Thiokol and replaced them with the following:

Time Period	Cents Per Pound
January 1, 1967—June 30, 1967	15.00
July 1, 1967—December 31, 1967	15.74
January 1, 1968—December 31, 1968	16.50
January 1, 1969—December 31, 1969	25.00
January 1, 1970—December 31, 1970	25.00
January 1, 1971—December 31, 1971	25.00
January 1, 1972—December 31, 1972	24.00
January 1, 1973—December 31, 1973	25.00

In December, 1966 and January, 1967, representatives of AMPOT met with officials of both Thiokol and Aerojet. These meetings were separately held but officials of both companies informed AMPOT that they were upset with the company's withdrawal of its forward prices. Thiokol informed AMPOT that it expected to have two sources of A/P available in 1967.[23] Aerojet

23. AMPOT felt certain that the other source was PE.

told the company's representatives that it was willing to support one supplier up until the time AMPOT's forward prices were withdrawn but that it would now try to keep PE alive.

Additionally, in February, 1967, AMPOT discovered that American Cyanamid had agreed to subordinate its $2,000,000 debt to allow PE to obtain a $500,000 bank loan. In the same month AMPOT undertook a financial analysis which revealed that this arrangement would allow PE to operate for slightly less than ten months. This analysis also showed that a price increase would be necessary in order for PE to avoid a cash drain and that PE's price would have to be raised to 19.25 cents per pound.

In October, 1967, AMPOT quoted Aerojet the following prices:

Time Period	Cents Per Pound
Last quarter of 1968	16.50
January/February 1969	17.25
March/September 1969	18.00

AMPOT claims that these forward pricing activities represented an attempt to raise the market price of A/P to a reasonable level. The company claims, however, that its efforts did not succeed due to the resistance of the rocket motor manufacturers and the conditions in the industry. In view of PE's evidence and AMPOT's lack of effective rebuttal, we choose to give weight to PE's interpretation of these activities.

[*Rebuttal*]

B. In rebuttal to PE's evidence, AMPOT claims the depressed prices were the result of the problems which existed within the industry and not its policies. The primary contentions which we find relevant and established by the evidence are the following:

1. *Problems in the A/P Industry*

The major problem which existed within the industry was an excess of supply. This condition was exacerbated by the fact that many of the major A/P procurements were stretched out over a

long period of time and by the fact that there were re-bids on many of the procurements.

This excess capacity existed due to predictions of great demand for A/P. These predictions induced all four major suppliers of A/P either to enter the field or expand their capacity. From 1959-1963 the attitude of the Department of Defense and propellant manufacturers was extremely bullish and there were estimates of future sales of A/P exceeding 100,000,000 pounds annually. As the president of U. T. C. stated in his deposition, in the early 60's there was almost a euphoria as far as the future was concerned and everyone visualized the field as a potential bonanza. By December, 1963, this optimism had vanished and the rocket people were competing frantically for the work which existed. It is this competition which AMPOT claims set the stage for the pressure which was exerted on the A/P suppliers.

An additional problem facing PE was the fact that the company was vastly under-capitalized. This meant that PE was faced with even more severe problems than the other A/P producers.

2. *Practices of the Rocket Motor Manufacturers*

Although AMPOT claims this overcapacity set the stage for the conditions which the A/P suppliers faced, the heart of the company's defense is that the rocket motor manufacturers took advantage of existing conditions and forced the suppliers to lower the price of A/P. It appears as if the manufacturers were able to carry out their activities due to the procurement practices in the A/P industry. Under these practices the rocket manufacturers would receive an indication of interest from the government concerning a particular program. The manufacturers would then send out Request for Quotes (RFQ's) to the suppliers. Once the manufacturers received quotes from the various suppliers[24] they would submit a bid to the government and a con-

24. Including those furnishing material other than A/P.

tract would be awarded to one of them. At this stage the winning manufacturer would send a second RFQ to the A/P suppliers. As a practical matter, however, the first RFQ set the ceiling price for the second.

The rocket manufacturers were interested in obtaining a high price for the first RFQ and a low price for the second. This desire can be explained by the fact that the manufacturer would share with the government in any savings between the first and the second bid. It was this arrangement which prompted the manufacturers to try to negotiate for a lower price with the A/P suppliers. They would carry out these negotiations by calling the suppliers and telling them to "sharpen their pencils."

The manufacturers negotiated with the low bidder without informing the bidder that its price was low. On several occasions this practice resulted in the low bidder further reducing its price. In addition to this type of negotiation, the manufacturers employed other methods of reducing the price. They would send RFQ's to both qualified and nonqualified sources and would never tell a company when it was the only qualified source. In fact, whenever a bidder asked if the bidding was going to be competitive, the response was always in the affirmative. The manufacturers strengthened their position in these activities by exchanging price and quantity information among themselves.

An example of these practices can be found in events surrounding a 1962 [sic] procurement of A/P. In July Thiokol decided to award PE a "stay alive" quantity as part of a larger procurement. This decision was made as it was thought PE probably could not as yet continue operations without Thiokol business. After this decision, one of Thiokol's officers had a conversation with War, PE's Vice-President. During this conversation War was told that PE's bid was high, but that Thiokol was considering awarding a "stay alive" quantity to the company. Soon after this conversation.

War telegraphed Thiokol that PE would meet any offer. Thus, PE lowered its price after a decision had been made to give the company an award at a higher price.

At one time even PE's counsel blamed the problems in the industry on the procurement contracts. This occurred on January 17, 1964, when Larson, PE's Washington counsel, stated that the incentive type contracts were responsible for the "whipsawing" which the raw material suppliers were taking on price.

3. *Pricing Sequences*

AMPOT claims the situation grew worse as the suppliers were forced to bid progressively lower prices for each procurement. It is this lowering of the price of A/P which AMPOT claims eventually forced Hooker and Pennwalt (Pennsalt) out of the industry. To establish this contention, AMPOT presented evidence concerning many of the A/P pricing sequences. We feel that a discussion of one will amply serve to illustrate this claim.

This sequence involves the 1964 U. T. C. procurement of over 11,000,000 pounds of A/P. PE offered to meet any price and was awarded the contract at 19.25 cents per pound. After this award, AMPOT considered each bid as critical since it appeared as if the U. T. C. business was tied up for the immediate future. In this regard AMPOT felt that it was essential to obtain the award for the upcoming Thiokol-Wasatch procurement and therefore bid 16.40 cents per pound in order to ensure that it would obtain a part of this award. It is this type of situation which AMPOT claims trapped the suppliers in a vicious circle from which they could not escape.

4. *AMPOT's Effort to Aid the A/P Industry*

AMPOT maintains that instead of attempting to establish a monopoly, it in fact made an effort to save the industry. In late 1965 AMPOT's representatives met with Malloy, Deputy Assistant Secretary of Defense (Procurement), to complain about con-

ditions existing in the industry. These emissaries told Malloy that procurement practices and excess capacity were endangering the industry. They also pointed out that two former suppliers had already "mothballed" their facilities. Malloy was informed that AMPOT desired a procurement system which would ensure both a good price for government contractors and a fair profit to suppliers.

This attempt to change the procurement system failed, and AMPOT felt that it could do very little to improve existing conditions. This feeling of resignation was due to the fact that AMPOT bought its A/P plant from the Navy and included within the contract of sale was a National Security Clause.[25] This clause required AMPOT to maintain the plant so that it could be placed in operable condition within 120 days. In light of this clause, AMPOT reviewed the financial consequences of abandoning the facility and concluded that it would be better for the company to sell A/P at 15 cents per pound and cover out-of-pocket cost rather than close down its operations.

In 1971, AMPOT felt as if it was close enough to the March 15, 1972 expiration of its National Security obligation that it could take some affirmative action. In February, 1971 Kelly, President of Kerr-McGee, told a meeting of SAMSO that his company had undertaken a study to determine if it should withdraw from the A/P industry. Additionally, in June, 1971, Kelly wrote to the Assistant Secretary of Defense (Installation and Logistics). His letter discussed the conditions in the industry and stated that AMPOT was planning to temporarily suspend operations at its A/P plant and was considering permanent suspension.

AMPOT claims this was the earliest it could have acted with any authority and that, as a result of this action, the SAMSO

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25. Malloy was well aware of this clause and reminded AMPOT of its existence.

agreement was reached. AMPOT's contention has some merit; however, it is less convincing than it might have been due to the fact that AMPOT did not do everything within its power to be relieved from its obligation. This is due to the fact that the National Security Clause contained the following provision:

> "Provided, However, That the Government, at its own election, or upon a petition by the Purchaser, may reconsider the necessity for continuing all or any part of the Clause in effect and shall, in the event it determines such necessity no longer exists, and upon tender by the Purchaser of whatever consideration may be requested, revoke the Clause, in whole or in part, by executing and delivering to the Purchaser a release or whatever instrument is necessary to remove the encumbrance of the Clause, or of part thereof, from the properties."

This provision allowed AMPOT to petition the government for a revocation in whole or in part. AMPOT never petitioned the government and thus its lack of action flies in the face of its claim that the National Security Clause prevented it from leaving the industry or making a meaningful threat to do so.

Conclusions of Law

ATTEMPTED MONOPOLY

In reaching a conclusion concerning an attempted monopoly, there is authority for the proposition that we must first define the relevant market within which the attempt took place. *Walker Process Equipment, Inc. v. Food Machinery and Chemical Corp.* [1965 TRADE CASES ¶ 71,625], 382 U. S. 172 (1965); *Agrashell, Inc. v. Hammons Products Company* [1973-1 TRADE CASES ¶ 74,446], 479 F. 2d 269 (8 Cir. 1973). Although we are not totally convinced that this determination is necessary, we will follow these authorities.

[*Geographic Market*]

The relevant geographical market does not present a problem as both parties have stipulated that it is the United States. The relevant product market, however, is not subject to such an easy resolution.

[*Product Market*]

On June 8, 1971, a supplemental preliminary pretrial order was entered by Judge Sherman Christensen. Prior to its being entered, it was approved by counsel for both plaintiff and defendants. The order stated that one of the issues to be determined was whether the relevant market included all A/P, as PE contended, or whether there were two markets, as Kerr-McGee contended. The defendants claimed that the first market consisted of A/P sold to customers who purchased in large volume in connection with the manufacturing of missiles for the Department of Defense and who purchased A/P based on a government required competitive bidding procedure, and that the second market consisted of A/P sold to customers who purchased in quantities of 100,000 pounds or less and who purchased at list price without competitive bidding. The first market is the one which Kerr-McGee claimed was the appropriate relevant market.

On May 7, 1973, at the outset of the trial, counsel for Kerr-McGee moved to amend this pretrial order so that we could consider whether the relevant market consisted solely of A/P sold to programs for which both plaintiff's and defendants' products were qualified. At that time, the court ruled that it would abide by Judge Christensen's order concerning the relevant market unless Kerr-McGee could convince the court that its version of the relevant market was appropriate. In effect, due to the lateness of the defendants' request, we placed the burden on Kerr-McGee to convince us that its new theory was correct.

At the outset of our determination of the relevant market, it is appropriate for us to comment on the use of Clayton Act cases in resolving the question of what products are to be included within this market. This is necessary because both plaintiff and defendants have relied on some of these authorities. After evaluating these cases, it is our conclusion that, where appropriate, we will rely on the cases dealing with a line of commerce. As was stated in *United States v. Grinnell* [1966 TRADE CASES ¶ 71,789], 384 U. S. 563 (1966), there is no reason to differentiate between line of commerce in the context of the Clayton Act and part of commerce for purposes of the Sherman Act. We also find support for this conclusion in *Telex Corp. and Telex Computer Products, Inc. v. I. B. M. Corp.* [1973-2 TRADE CASES ¶ 74,774], 367 F. Supp. 258, (D. C. Okla. 1973). In *Telex,* Judge Christensen stated that "while there may be a possible differentiation between a part of commerce and a line of commerce in the solution of some problems that might arise under the respective acts, no practical distinction would be justified in the context of the present case."

While we are willing to rely on many of these lines of commerce cases, we do not feel that cases such as *United States v. Falstaff Brewing Corp.* [1973-1 TRADE CASES ¶ 74,377], 410 U. S. 526 (1973), are in point. These cases deal not with the Section 2 concept of relevant market, but rather with "the effect of a potential competitor upon the edge of the market in negating the desirability of its merger in a Section 7 case." *Telex, supra.* Here we deal not with probabilities but rather with what the defendant actually accomplished or attempted to accomplish within the market.

Defining the relevant market is important because it is the market within which the monopoly or attempted monopoly is to be measured. This market must include all A/P which effectively competed with Kerr-McGee's. Basically, the parties have

no dispute concerning the governing authorities on this issue. Both sides rely on such cases as *United States v. DuPont de Nemours and Co.* [1956 TRADE CASES ¶ 68,369], 351 U. S. 377 (1956); *United States v. Aluminum Co. of America* [1944-1945 TRADE CASES ¶ 57,342], 148 F. 2d 416 (2 Cir. 1945); *Brown Shoe Co. v. United States* [1962 TRADE CASES ¶ 70,366], 370 U. S. 294 (1962); *United States v. Grinnell, supra; United States v. Continental Can Co.* [1964 TRADE CASES ¶ 71,146], 378 U. S. 441 (1964); and *Continental Baking Co. v. Old Homestead Bread Co.* [1973-1 TRADE CASES ¶ 74,433], 476 F. 2d 97 (10 Cir. 1973). The parties, however, disagree as to the application of these authorities to the facts in the case at bar.

Their disagreement is quite understandable as all of the pertinent decisions indicate that the determination of which products are to be included within the relevant market turns almost exclusively on the factual posture of each case. These cases do, however, indicate that what is crucial to the final determination is the "cross-elasticity of demand" between the various products which are claimed to be within the market.

This concept involves the ease with which one product can be substituted for another. It was explained in *DuPont, supra,* when the court stated that, in considering the relevant market, no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purpose make up that "part of the trade or commerce" monopolization which may be illegal. In elaborating on the teachings of *DuPont,* the court in *Grinnell, supra,* declared that a product was reasonably interchangeable if it may be of such a character that substitute products must also be considered, as customers may turn to them if there is a slight increase in the price of the main product.

As can be inferred, price is an important factor in determining which products are within the relevant market. Price, however, is not the only factor which we must consider. This was made

clear in *DuPont,* when the court observed that the question of cross-elasticity of demand is determined by this interchangeability which is largely gauged by the purchase of competing products for similar uses considering the price, characteristics and the adaptability of competing products. It is also abundantly clear that the term "reasonable interchangeability" should be given a practical application in view of conditions in the marketplace. *Telex, supra.*

[*Qualified v. Nonqualified Products*]

The problem in the case at bar centers around the fact that government regulations required rocket motor manufacturers to purchase A/P from sellers whose product was qualified for the particular rocket the manufacturer was producing. Kerr-McGee's A/P was qualified for most of the rocket programs while PE's was not. The rocket motor manufacturers, however, never informed a company when it was the only qualified source and thereby encouraged competitive bidding even in what could have been noncompetitive situations.

The prerequisites for qualification vary from program to program but, as previously mentioned, they usually include extensive laboratory testing and a static test firing of one or more rocket motors. Qualification is a one-time process, and the government pays for the cost if it occurs during the research and development stage of the program. The qualification test is, of course, the function of the rocket manufacturer and the supplier has no control over same.

Evidence presented indicates that the cost of qualification varies from $25,000 to $125,000. For most of the programs, however, PE's product could have been qualified for under $50,000. An example of these qualification expenses can be seen by noting Aerojet's cost figures which are as follows:

Program	Cost
Minuteman Stage II & III	$250,000
H. I. P.	30,000
Sparrow Shrike	20,000
Hawk	30,000
Standard Missile	45,000
Improved Shrike	25,000
Tartar/ARM	45,000

As near as we can determine,[26] the direct cost of qualification for most programs would, if prorated over the total program procurement, amount to a cost ranging from a fraction of a cent per pound to 2 or 3 cents per pound.

It is our belief that if cost alone were the only barrier to the qualification of PE's A/P, then there would be no question but that Kerr-McGee's qualified A/P would have to be included within the relevant market. This is because a slight increase in the price of Kerr-McGee's product would make it worthwhile for the rocket motor manufacturers to qualify PE's A/P. The problem, however, is that in addition to the cost of qualification, there is some evidence to support Kerr-McGee's contention that manufacturers were reluctant to undertake the qualification of nonqualified A/P. This reluctance was apparently due to the time factor involved in qualification as well as the lack of knowledge concerning the performance of nonqualified A/P. These factors, together with the cost, are the basis of Kerr-McGee's claim that its qualified A/P cannot be included within the relevant market if it was the only product qualified for a particular program.

Standing alone, this evidence would probably be sufficient to establish that the requisite cross-elasticity of demand between

26. We realize that our computations are not entirely accurate due to the lack of complete information on the subject; however, we are confident that they may be considered as fairly reliable "ballpark figures." We also feel that it was part of Kerr-McGee's burden to provide us with specific evidence on this issue per the pretrial stipulation.

qualified and nonqualified A/P did not exist. The defendants' evidence, however, does not stand uncontradicted and the plaintiff's evidence indicates that PE's product could have been easily qualified. Among other facts, this evidence includes the following:

1. A statement by Ritchey, Chairman and Chief Executive Officer of Thiokol, that PE could be qualified for all programs if it were not for the expense;
2. A statement by U. T. C.'s Procurement Manager that his company would submit RFQ's to nonqualified suppliers and qualify them if their price was low enough; and
3. A statement by Thiokol's Manager of Procurement that PE's A/P could be qualified if necessary and that, in an emergency type situation, there were many different and less expensive methods of qualifying A/P.

Additionally, Kerr-McGee's Vice-President of Corporate Services stated that the business for which his company was the only qualified source was not locked up or captive business.

After considering all of the evidence, it is our conclusion that the requisite cross-elasticity of demand did exist and that PE's nonqualified A/P was in competition with AMPOT's exclusively qualified A/P. Therefore, both must be included within the relevant market. This result is in accordance with the governing authorities, and Kerr-McGee's reliance on cases such as *Continental Baking Co., supra,* is misplaced. In *Continental Baking Co.,* the question of what products were within the relevant market was resolved in favor of the plaintiff. This resolution occurred when the court decided that the relevant market included only bread sold by independent wholesale bakers and not that produced by the baking operations of the retail food store chains. The court considered this a realistic construction of the relevant market as the customers of the independent bakers—independent retail grocers—could not purchase bread from the retail chains. It is clear

that this type of situation is different from the one in the case at bar as the rocket motor manufacturers could have purchased PE's product if they desired to undertake its qualification.

Admittedly this is a close question and our conclusion may be in error. In any event, however, we believe that the defendants' exclusively qualified material must be included within the relevant market as Kerr-McGee did not meet its burden of convincing us to disregard the initial stipulation. It is also appropriate to note the fact that one of Kerr-McGee's main contentions is that it could not raise the price of its A/P for fear of losing business to PE. This claim flies in the face of the company's argument that its exclusively qualified A/P was not in competition with PE's nonqualified A/P.

This brings us to the question posed in the original stipulation of whether the relevant market consists of all A/P as contended by plaintiff, or only the A/P sold to customers who purchased in large volume in connection with the manufacture of missiles for the Department of Defense and to those who purchased A/P based on a government required competitive bidding procedure. This problem arises due to the fact that almost all A/P was sold on a bid basis. As a result, the industry sales emphasis was primarily on these sales and not on the small quantities[27] of A/P which were priced pursuant to a schedule.

[*Scheduled Sales*]

Since the focus of attention at trial was on the issue of whether Kerr-McGee's exclusively qualified A/P was within the relevant market, neither plaintiff nor defendant presented a great deal of evidence concerning the question of whether the schedule sales were to be included within the relevant market. Enough evidence,

27. These sales were almost always in quantities of less than 100,000 pounds.

however, was presented to enable us to reach a determination that the relevant market includes all A/P.[28]

Defendants' primary contention is that PE did not compete for the schedule sales and that, therefore, these sales must be excluded from the relevant market. Although PE may not have achieved as much success with these sales as it desired, the company was certainly competing for this business. At trial, Fred D. Gibson, Jr., President and Chief Executive Officer of PE, testified that his company sold minor quantities of A/P based on a price schedule. In his posttrial deposition,[29] Gibson elaborated on PE's efforts in regard to these small sales and made it clear that PE did everything within its power to increase the number of these sales. Henry Curtis' testimony concerning his activities with regard to the 100 pound A/P order for PE which came to AMPOT by mistake resolves any doubt concerning the competition for these sales.

There is no question that the activities concerning the large competitive bid sales are at the heart of PE's claim. This, however, only reflects the fact that the schedule sales were a relatively insignificant aspect of the A/P market and does not by any means indicate that they are to be excluded from the relevant market. All A/P is basically the same and has only the few limited purposes previously described. We have concluded that AMPOT desired to obtain as much A/P business as possible. This includes these small schedule sales.

Of course, the A/P sold in schedule sales could probably be classified as a submarket but it is also true that most of the A/P

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28. Although we find the schedule sales to be within the relevant market, it may be that the parties can stipulate that sales under a certain number of pounds were so insignificant as to be immaterial to our forthcoming consideration of damages.

29. We find that section of the deposition dealing with these sales is admissible as the information concerns the relevant market and responds to Kerr-McGee's contentions. However, even if this deposition was inadmissible, our opinion would be the same.

sold for specific programs could be classified as a separate submarket within the broad product market. It is, however, the broad overall A/P market within which the competition between the plaintiff and defendant took place and to subdivide this market into the various possible submarkets would be as unnecessary as it would be unwise.

[*Elements*]

Having decided on the appropriate relevant market, we now turn to the elements which comprise an attempted monopoly.

[*Intent*]

In order to establish such an attempt, the plaintiff must prove that the defendant had the specific intent to destroy competition or create a monopoly, that the defendant took overt acts pursuant to this intent, and that a dangerous probability of monopoly existed. *Swift and Company v. United States,* 196 U. S. 375 (1905); *United States v. Griffith* [1948-1949 TRADE CASES ¶ 62,246], 334 U. S. 100 (1948); *Lorain Journal v. United States* [1950-1951 TRADE CASES ¶ 62,957], 342 U. S. 143 (1951); *Kearney and Trecker Corp. v. Giddings and Lewis, Inc.* [1971 TRADE CASES ¶ 73,735], 452 F.2d 579 (7 Cir. 1971).

In the case at bar, the primary question is whether AMPOT possessed the requisite specific intent. We have studied the authorities cited by both parties and have concluded that whether the necessary specific or predatory intent existed cannot be determined by any set formula but depends entirely on the acts of the alleged predator. In order to fully evaluate these acts, we must consider the sum total of all the evidence. *Continental Baking Co. v. Old Homestead Bread Co.* [1973-1 TRADE CASES ¶ 74,433], 476 F. 2d 97 (10 Cir. 1973). We further realize that there must be some affirmative showing of conduct from which the wrongful intent can be inferred. *Union Leader Corp. v. Newspapers of New England, Inc.* [1960 TRADE CASES ¶ 69,862], 284 F. 2d 582 (1 Cir.

1960), and *Hiland Dairy, Inc. v. Kroger Co.* [1968 TRADE CASES ¶ 72,611], 402 F. 2d 968 (8 Cir. 1968). We have carefully weighed the evidence and have concluded that such conduct is present.

[*Below Cost Sales*]

As is claimed by PE there is ample evidence of predatory intent. The most convincing evidence is the fact that all of Kerr-McGee Chemical Corporation's and its predecessor's major sales during and for some years prior to the four year and nine month damage period were below cost. Price reduction in a competitive situation is not a wrong in itself; however, it can become a violation of Section 2 if shown to be motivated by a specific intent to drive a competitor from the field. *Gold Fuel Service, Inc. v. ESSO Standard Oil Co.* [1962 TRADE CASES ¶ 70,409], 306 F. 2d 61 (3 Cir. 1962). Historically, it does not take a great deal of evidence to prove this intent when a company has sold below cost. AMPOT's extended below cost selling combined with its other acts provide the specific intent in the case at bar.

We find this intent notwithstanding the fact that a company which reduces prices in defense of its economic life is not guilty of eliminating competition. *Ben Hur Coal Co. v. Wells* [1957 TRADE CASES ¶ 68,635], 242 F. 2d 481 (10 Cir. 1957). But for Kerr-McGee's extensive predatory activities, this defense would probably have saved the defendants as we find that the A/P industry was in trouble and that many practices of the rocket motor manufacturers were unethical if not unlawful. Kerr-McGee's activities, however, indicate that, even viewed in the most favorable light, AMPOT and its successor, Kerr-McGee Chemical Corporation, sought to take advantage of a troublesome situation and force PE out of the market.

Kerr-McGee's claim that it was not the first company to lower the price does not persuade us that it did not possess the requisite intent. It is true that AMPOT may not have been the first to bid

15 cents or to lower the price of A/P below 20 cents; however, when the company did bid 15 cents on a multi-year procurement at Thiokol-Wasatch in June, 1965, it did so with the clear knowledge that if this price were maintained it would drive PE into bankruptcy.

Most of Kerr-McGee's other contentions concerning these below cost sales are equally unpersuasive. For example, it claims that it could not raise its price for fear of losing business to PE. However, in 1968 PE was bidding 2 to 3 cents per pound higher than AMPOT and losing almost all of the major bids. The realities of the marketplace are such that AMPOT must have known that it could bid higher. Very few businesses in this situation would have overlooked the opportunity. This 1968 situation also undercuts AMPOT's argument that the company was trapped by the various pricing sequences.

The defendants' argument that it could never achieve a monopoly due to the manufacturers' "dual sourcing" also fails to persuade the Court. Again the realities of the marketplace are such that a company which really believed this to be the case would have concluded that this policy would allow both A/P suppliers to raise their prices. The SAMSO agreement was effective long after this litigation had been instituted.

It is not just the sales below cost, however, which convince us that AMPOT and its successor possessed the requisite predatory intent. Kerr-McGee's other activities are equally persuasive. The company's forward pricing activities are particularly telling since, as PE claims, AMPOT's forward prices were raised when PE appeared on the verge of bankruptcy and lowered when it looked as if PE would remain a viable competitor. The extensive surveillance is also indicative of predatory intent although, standing alone, it would not justify our decision. Additionally, we feel that AMPOT's extensive interest concerning PE's SBA status is symbolic of the company's efforts to drive PE from the market.

The alleged "dumping" incident must also be considered since it involved one of AMPOT's vice-presidents and the company's product manager. Although these men may not have been in sales, they did represent the company. Jenny's memo concerning the "seed of doubt" that a better price was available resolves any doubt in our minds that Schumacher's role was more than just an "unauthorized gambit."

Finally, AMPOT's predictions of market sales indicate that the company's goal was to capture the entire A/P market. Of course, it is only good business for salesmen to attempt to sell all the products which their company can produce; however, the fact that Kerr-McGee changed its pricing policy after it lost two competitive bids in 1969 indicates that it was not willing to share the market with PE and that the salesmen's statements were indicative of a policy which was more than just good business.

[*Acts; Probability*]

The other two elements required to establish an attempted monopoly present no problem. The overt acts are obviously the acts which gave rise to our finding of predatory intent. The dangerous probability of establishing a monopoly is present since we are about to conclude that AMPOT and its successor succeeded in establishing a monopoly. Thus, all three elements are met and we find that there was an attempt to establish a monopoly.

MONOPOLY

We now focus our attention on PE's monopoly claim. To support its charge, the plaintiff must prove that the defendant had possession of monopoly power within the relevant market and that this power was willfully acquired or maintained as distinguished from being secured by growth or development which was a consequence of a superior product, business acumen or historical accident, *United States v. Grinnell Corp., supra.* After a

thorough consideration of the record and evaluation of the facts heretofore presented, it is our conclusion that the plaintiff has met its burden and that AMPOT and its successor possessed a monopoly. Since we have previously ruled that there was the specific intent required to establish a monopoly, we feel certain that, if monopoly power did exist, it was willfully acquired and maintained. This leaves us with the question of whether Kerr-McGee Chemical Corporation or its predecessor actually possessed monopoly power within the relevant market. This market is, of course, the same as for the attempted monopoly.

Monopoly power is the power to control prices or exclude competition and, if it exists, it can furnish the basis for a monopoly even if it was never exercised. *American Tobacco Company v. United States* [1946-1947 TRADE CASES ¶ 57,468], 328 U. S. 781 (1946), and *Grinnell, supra.* This power may be inferred when a company has a predominant share of the market. Among other instances, it has been inferred when a company contolled over 87% of the insurance company accredited fire and burglary central service stations, *Grinnell, supra,* and when cigarette companies possessed over 66% of the entire domestic field of cigarettes and over 80% of the field of comparable cigarettes, *American Tobacco Co., supra.* On the other hand, it has been said that it is fairly clear that 51% of the market does not constitute a monopoly, *Continental Baking Co., supra.*

As previously mentioned, in the present case AMPOT and its successor possessed the following percentages of business within the relevant market:

Year	*Percentage*
1966	53.5
1967	80.0
1968	88.0
1969	67.0
1970	78.0

Certainly, AMPOT's market share in 1966 is not sufficiently large enough to allow us to infer a monopoly. Its 1967, 1968 and 1970 shares, however, do permit this inference. As to its 1969 share, this percentage is on the borderline but probably supports the inference.

Defendants suggest that, instead of these figures, we rely on the company's average percentage of the market for the years 1966 through 1971[30] which Kerr-McGee admits is 70%. Even using this percentage, however, would allow us to infer a monopoly.

In any event, we need not rest on any inferences from these percentages as we find that Kerr-McGee Chemical Corporation and/or its predecessor had the power to control prices. Even though there were many problems within the industry, we believe that the responsibility for the continued sales below cost rests with this defendant. We feel the defendant used its vast financial resources to subsidize its below cost pricing. Although we do not believe that the initial drop in the price of A/P[31] was AMPOT's responsibility, we do feel that, subsequent to the initial drop, AMPOT and its successor were responsible for maintaining the depressed prices. The information available to AMPOT's top officials at their June, 1965, pricing meeting together with the acts considered in connection with the attempted monopoly claim are sufficient to support this conclusion.

In addition to the ability to lower the price of A/P, we believe AMPOT could have also raised the price.[32] Gibson testified that, if AMPOT had published a price for A/P, PE would have followed that price as long as it would have allowed his company a profit. We firmly believe that, after Hooker and Pennwalt left

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30. We note that 1971 is not included within the damage period.

31. This reduction occurred when Hooker, Pennwalt and PE entered the field.

32. Of course, the defendant could not have raised the price to 40 cents per pound, but it could have exercised leadership at least into the 20 cent range.

the industry, a business in the plaintiff's precarious financial position could not have afforded to reintroduce a dangerous price war by undercutting a higher price led by AMPOT. At trial Gibson said as much when he testified that his company would have followed AMPOT's price "for the same reason that we recognized our size, we recognized our limited financial ability, and would very much have welcomed to follow the price leadership of American Potash if it had been at that kind of level." Therefore, we have no doubt that AMPOT and its successor could control the price of A/P and possessed a monopoly.[33]

COMBINATION AND CONSPIRACY

We direct our attention to PE's charge that Kerr-McGee Chemical Corporation[34] and Kerr-McGee Corporation have since or prior to December 31, 1967, and continuing until after December 22, 1970, conspired to monopolize trade and commerce in Classes I and II A/P in violation of Section 2 of the Sherman Act and combined and conspired in restraint of trade and commerce in Classes I and II A/P in violation of Section 1 of the Sherman Act. Specifically, in regard to the Section 1 violation, PE contends that the defendants combined and conspired among themselves to control the supply, distribution, and price of A/P and to suppress and eliminate competition in the sale thereof. Although these

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33. Since AMPOT possessed the power to control the price of A/P, we find it unnecessary to rule on whether the company also possessed the power to exclude competition. If we were to decide this issue, however, we would rule that the defendant had this power. AMPOT knew that Hooker and Pennwalt left the industry due to the low price of A/P and that by keeping the price low, or threatening to do so, it could prevent the re-entry of these companies and also eventually force PE out of the market. It is this knowledge combined with the company's power to control the price which gave AMPOT the power to exclude competition.

34. When used in connection with these charges as with others, we consider the activities of Old and New AMPOT to be considered as part of those of Kerr-McGee Chemical Corporation.

offenses under Section 1 and Section 2 are not identical, the substance of each claim is the same, and we will treat them together.

Both claims arise from the merger of AMPOT and Kerr-McGee, and a brief review of the history of Kerr-McGee's acquisition of AMPOT is in order. As previously mentioned, AMPOT was acquired by Kerr-McGee on December 31, 1967, and New AMPOT was merged with Kerr-McGee Chemical Corporation in October, 1970. PE's claims are based on the inferences to be drawn from the fact that these activities left Kerr-McGee Chemical Corporation as a subsidiary of Kerr-McGee Corporation, and that some directors were common to both companies. Primarily, PE relies on the fact that the acquisition left James J. Kelly, current President of Kerr-McGee Corporation, in a position of authority in both companies. In 1966 Kelly was President of Kerr-McGee Chemical Corporation which was then a division of Kerr-McGee Corporation engaged solely in agricultural chemical business. In early 1969 Kelly was elected a vice-president of AMPOT, and he became president later in the year. He continued as president after AMPOT was combined with Kerr-McGee Chemical Corporation. Kelly was also executive vice-president and a director of Kerr-McGee Corporation during most of this period.

As both plaintiff and defendants seem to realize, this particular aspect of the case does not merit a great deal of attention. As plaintiff contends, it is settled law that a parent and subsidiary can be guilty of either an unlawful combination or a conspiracy. *Kiefer-Stewart Co. v. Seagram and Sons* [1950-1951 TRADE CASES ¶ 62,737], 340 U. S. 211 (1951); *Perma Life Mufflers, Inc. v. International Parts Corp.* [1968 TRADE CASES ¶ 72,486], 392 U. S. 134 (1968). It is equally well settled that a combination or conspiracy can be established by an informal agreement. As was said in *American Tobacco Co. v. United States* [1946-1947 TRADE CASES ¶ 57,468], 328 U. S. at 809-10, "No formal agreement is necessary to constitute an unlawful conspiracy. . . . The essential

combination or conspiracy in violation of the Sherman Act may be found in a course of dealing or other circumstances as well as in an exchange of words." Indeed, many courts have found a combination or conspiracy by drawing inferences from the knowledge of members of interlocking directorates. For example, in *United States v. N. Y. Great Atlantic and Pacific Tea Co.* [1948-1949 TRADE CASES ¶ 62,375], 173 F. 2d 79 (7 Cir. 1949), the court stated that "the individual defendants are so high in the hierarchy of the A & P system that the policy of A & P, that is, the conspiracy here charged, was fully well known to all of them. . ."

According to these and other authorities, if there were any evidence to add to the facts presented, we would be justified in finding that an agreement existed between Kerr-McGee Corporation and Kerr-McGee Chemical Corporation whereby Kerr-McGee Corporation approved of or aided Kerr-McGee Chemical Corporation in its monopolistic activities. The record, however, is devoid of any such evidence. In fact, the evidence PE submitted as additional proof of the charges rebuts the company's claims. PE contends that when Kelly had control over the pricing of A/P he was seriously misled and/or uninformed concerning the A/P market. PE further points out that Kelly was told his company just was not getting the A/P business or a sufficient percentage of the market. Additionally, at trial, PE went to great lengths to convince us that, during the year 1969, Kelly spent very little of his time dealing with the problems in the A/P industry.

PE sums up its position quite accurately when it states the following:

> "Thus, although the control over A/P pricing technically shifted to Kelly in 1969, the same predatory policies continued because of Kelly's heavy reliance on Francis, who was one of the architects of AMPOT's plan to regain its monopoly." Plaintiff's port-trial brief, pp. 76-77.

This position negates rather than supports PE's claims. If anything, it shows that Kelly,[35] the major link between parent and subsidiary, was deceived by those in effective control of the subsidiary, and indicates that there could not possibly have been any agreement (whether express or implied) between the two corporations. In light of this situation, the inferences PE asks us to draw prove too much and we find for the defendants on both claims alleging combination and conspiracy.

UNFAIR COMPETITION

Plaintiff also alleges in its complaint that defendants have engaged in unfair competition by repeatedly disparaging the products and personnel of plaintiff and, by so doing, have diverted business from plaintiff to themselves regarding A/P and sodium chlorate, and have issued false and misleading statements with respect to plaintiff's financial responsibility and position. Apparently plaintiff has abandoned this claim as it has made no further reference to it. Even if this claim is still asserted, however, we find that there is no evidence to sustain the charge.

ROBINSON-PATMAN ACT CLAIMS

Plaintiff's claims under 15 U. S. C. § 13 (a) are broadly made. There appear to be two distinct claims. First, that the higher prices charged by defendant to small volume buyers were a violation of the Act and, second, that the different prices charged various large volume buyers were a violation of the Act.

A private claim under the Robinson-Patman Act, § 2(a), requires six elements:

1. The seller must be engaged in interstate commerce.
2. There must be differences in price in different sales.
3. The price differentiated commodities must be of like grade and quality.

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35. If Kelly was deceived or misinformed, we feel certain that none of the other members of Kerr-McGee's Board of Directors fared any better.

4. At least one price differentiated sale must be in actual interstate commerce.

5. The price differentiation must be the cause of harm to competition in one of the ways enumerated in the Act.

6. None of the affirmative defenses enumerated in the Act can be applicable.

There is no controversy as to elements one, two, and four. AMPOT was clearly engaged in interstate commerce, did charge varying prices, and did make at least one price differentiated sale in interstate commerce.

There is controversy as to the remaining elements. In addition, AMPOT contends that its sales to rocket manufacturers should be exempt from the Act because the ultimate consumer was the government. Though government actions are excluded from the coverage of the Act [1932-1939 TRADE CASES ¶ 55,145] 38 Ops. Atty. Gen. 539 (1936), AMPOT has cited no support for the proposition that sales to private parties are exempt merely because the ultimate consumer is the government. Since the government as ultimate consumer would benefit by vigorous competition among those it buys from and their suppliers, no public policy would be served by such an exception.

The issue of like grade or quality will be considered separately, and the remaining elements of a Robinson-Patman Act violation considered under each of the two Robinson-Patman Act claims.

(A) *Like Grade and Quality*

The standards to be applied to determine whether commodities are of like grade and quality are not well defined. "Commercial identity or commercial fungibility,"[36] "substantially equivalent

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36. *Fred Meyer, Inc. v. F. T. C.* [1966 TRADE CASES ¶ 71,721], 359 F. 2d 351 (9 Cir. 966, rev'd on other grounds [1968 TRADE CASES ¶ 72,383], 390 U. S. 541.

public demand," [37] "similar characteristics,"[38] "cross elasticity of demand, substitutability, physical appearance, identity of performance,"[39] "same general functions,"[40] and "similar swilling characteristics"[41] have all been used as factors determining "like grade or quality."

The disparity of the tests used suggests that the test to be applied is determined by the facts of each case. What constitutes bananas to be of like grade and quality and taxicabs to be of like grade and quality is not necessarily the same. The purpose of the inclusion of like grade and quality in the Robinson-Patman Act appears obvious: "To insure that the application of the anti-price discrimination law is confined to a comparison of two business transactions reasonably comparable . . ." *American Bar Association, Anti-Trust Developments 1955-1968,* p. 120. The proper test to apply to a particular case should reflect this purpose as well as the broader purposes of the anti-trust and price discrimination law.

The facts show that A/P was divided into two major classifications, Class I and Class II, by the manufacturers on the basis of particle size. Rocket manufacturers were concerned about uniformity of the product and would sometimes require the A/P to meet specifications more exacting as to particle size than the manufacturers' broad classification of Class I and Class II. Because the

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37. *Callaway Mills Co. v. F. T. C.* [1966 TRADE CASES ¶ 71,799], 362 F. 2d 435 (5 Cir. 1966).

38. *Lubbock Glass and Mirror Co. v. Pittsburgh Plate Glass Co.* [1970 TRADE CASES ¶ 73,355], 313 F. Supp. 1184 (N. D. Tex. 1970).

39. *Checker Motors Corp. v. Chrysler Corp.* [1968 TRADE CASES ¶ 72,392], 283 F. Supp. 876 (S. D. N. Y. 1968), aff'd [1969 TRADE CASES ¶ 72,672] 405 F. 2d 319, cert. den. 394 U. S. 999.

40. *McWhirter v. Monroe Calculating Machine Co., Inc.* [1948-1949 TRADE CASES ¶ 62,277], 76 F. Supp. 456 (W. D. Mo. 1948).

41. "Four Roses under any other name would still swill the same," *Hartley & Parker, Inc. v. Florida Beverage Corp.* [1962 TRADE CASES ¶ 70,441], 307 F. 2d 916, 923 (5 Cir. 1962).

crucial and critical burning characteristics of solid fuel rocket motors had not been reduced to an exact science capable of predicting the results of variations in specifications, these stricter specifications were frequently not so much an effort to obtain a particular form of A/P as to obtain a form of A/P nearly identical with that used previously. Government contractual requirements contributed to this need for identically specified A/P.

These requirements of uniformity were met by the producers of A/P in several ways, the most important of which was crossblending, that is, blending of inventory lots of different characteristics to ensure a homogeneous product. Selective crossblending met many of the specification requirements, though some required additional selection for size.[42] Crossblending is a common method of assuring uniformity of product in other industries including petroleum, dye, paint, gunpowder, whiskey, wine, tobacco and coffee.

AMPOT argues that the necessity of meeting each manufacturer's specifications and of ensuring that the product delivered to each manufacturer remained consistent should remove the bulk of A/P sales from being considered sales of like grade or quality.

We find that A/P within the two major classifications of Class I and Class II was A/P of "like grade and quality." We base this conclusion on several points which we find pertinent.

[*Usage*]

Initially there is no substantial difference in functional customer usage of the product. Practically all A/P was used by rocket motors. Though specifications may have differed among programs, frequently they overlapped, were interchangeable, or were differ-

42. Some procurements were for highly differentiated A/P of very high purity, chloride free, or other special characteristics. These specialty sales which constituted a very small portion of AMPOT's sales are not of like grade and quality and should be identified and excluded in the determination of damages.

ent for the same program. The situation is analogous to that of a paint manufacturer supplying paint to house painters. Though the buyer may specify a different color for each house, the usage is the same and like grade and quality should apply to the broader classification of usage rather than to the subclassification based on color.[43]

[*Physical Characteristics*]

Further, the desire of the customer for a particular specification was more the result of a desire for reproducibility rather than any initial desire for a "different" product than the larger classification. The rocket manufacturer is similar to the house painter who, initially having desired "green" paint and having painted half the house, now desires identical paint to that which he initially procured. To accept this desire for reproducibility as a determination of like grade and quality is to unduly restrict the Robinson-Patman Act by limiting its applicability while expanding the definition of "like grade and quality" beyond its purpose of limiting comparisons to comparable transactions. There would appear to be no injustice in comparing one transaction to another where both transactions involve the same product manufactured identically in the same process with only selections for variations in granular size differentiating the two.[44]

AMPOT has suggested that two Federal Trade Commission cases, *Universal-Rundle Corp.*, 65 F. T. C. 924 (1964), and *Quaker Oats Co.*, 66 F. T. C. 1131 (1964), stand for the proposition that "actual and genuine physical differentiations between two different products . . . probably remove differential pricing

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43. *McWhirter v. Monroe Calculating Machine Co., Inc., supra.* The Court held adding machines to be of like grade and quality on the basis of functional similarities both in operation and in customer usage.

44. We regard it as significant that Congress used the term "like" rather than the more restrictive term "same." Similarly, the use of "grade" and "quality" suggests something other than a requirement of identical or near identical commodities.

of the two from the reach of the Robinson-Patman Act."[45] Both cases support the proposition, but neither case holds *any* physical differentiation is sufficient to eliminate comparisons under the "like grade and quality" test. In both cases there were considerably more substantial differences in the compared products than are present here.

In *Universal-Rundle Co.,* the examiner found various plumbing fixtures not to be of like grade or quality on the basis of differences in style, function, size, and marketability. In *Quaker Oats Co.,* the commission rejected the examiner's finding of like grade and quality with respect to two oat flours. Physical differences included particle size, fiber content, and the presence of pericarp and perisperm which caused discoloration of the cereal product. It is significant that the commission did not base its finding on the fact that Quaker custom tailored each oat flour process to its customer's needs, but rather on the actual physical differentiations and their effect on consumer preference or marketability.

[*Seller's Conduct*]

AMPOT's own course of conduct strongly suggests that a determination that the A/P was of like grade and quality is proper. The price differences applied by AMPOT were not on the basis of differences in grade or quality, but based on differences in size of sales or the need for pricing to win a contract. In an analogous case, *Moog Industries, Inc. v. F. T. C.,* 238 F. 2d 43 (8 Cir. 1956), aff'd 355 U. S. 411 (1958), cited with approval in *Universal-Rundle Corp., supra,* dealing with an auto parts manufacturer who provided volume discounts on each broad line of parts, the court held that like grade or quality was irrelevant when applied on a narrow basis:

> "The real and substantive answer is that, while leaf springs, coil action parts or piston rings for a Ford sedan of

45. Consumer preference, standing alone, has specifically been rejected as a determinant of like grade or quality. *F. T. C. v. Borden Co.* [1966 TRADE CASES ¶ 71,716], 383 U. S. 637 (1966).

> 1947 may be sufficiently different from those for a Chevrolet coach of 1950 that the former could lawfully be sold for *uniform* higher or lower prices than the latter, the question here is not related to uniform different prices for different items, nor, hence, to the like grade and quality concept, because the price discriminations here did not arise from uniform different prices for particular items, but, rather, they arose solely from the cumulative annual rebate plan, which applied to the aggregate dollar volume of all sales in a particular line to a particular purchaser in the preceding year, and, therefore, necessarily discriminated in price as to all items in the line, whether exactly alike and interchangeable or not." 238 F. 2d 43, 50.

This reasoning is directly applicable to price discrimination between large volume and small volume purchasers of A/P. Though not as directly, it is equally applicable to the various large volume bids for an examination of the evidence shows little relationship between the various specifications and the price discriminations.

For these reasons we conclude that all A/P sold within the broad Class I and Class II classifications was of like grade and quality.

(B) *Small Volume Purchases*

AMPOT's policy was to sell small quantities of A/P up to 100,000 pounds according to several price schedules.[46] Prices varied according to the quantities ordered, but all small volume prices were substantially above the prices bid on large volume orders.[47]

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46. Some small quantity purchases appear to have been ordered on a bid basis. AMPOT's bids were substantially higher for small quantities than large quantities.

47. Some idea of the price differential may be obtained from AMPOT's exhibit 1080, the price schedule for 1968. During 1968 most large quantity bids of A/P were in a 16 to 18 cents per pound range. The prices for small quantities were: less than ton lots—32.5 cents per pound; ton lots—26.5 cents per pound; truck load (44,000 lbs. minimum) or carload up to 99,999 lbs.—19.62 cents per pound; over 100,000 lbs.—18.62 cents per pound.

AMPOT has made no substantial effort to cost justify these price differentials. It would appear difficult to do so since A/P is manufactured by AMPOT in a continuous process and orders, save for very large ones, are filled from a stockpile inventory. There would, of course, be some sales overhead cost such as billing, accounting, etc. that would justify a slightly higher price, but AMPOT did not make a substantial sales effort devoted to small sales (save for those that might possibly lead to future large sales) and the increased sales overhead would be negligible.

AMPOT instead relies on three defenses to the Robinson-Patman claim predicated on the small volume purchases:

1. PE did not compete for the small volume business.
2. The varying cost schedules were available to all customers provided they ordered sufficient quantities.
3. The small volume price discrimination did not cause substantial competitive injury.

The first defense is supported neither by law nor by fact. We have previously found that PE did compete with AMPOT for small volume purchases, though concededly neither company directed any large sales effort to small jobs save as they might later be the basis for large jobs. Legally, it is irrelevant whether or not PE competed with AMPOT for the small volume business. Indeed, the most common type of Robinson-Patman claim is that the defendant raised prices on the same goods in areas where there was no competition in order to support lower prices where there was competition, and the Robinson-Patman Act was designed to end this type of price cutting. Competition is only required on one "end" of the price differentiated sales in order for there to be competitive injury and a violation of the Act. *Moore v. Mead's Fine Bread Co.* [1954 TRADE CASES ¶ 67,906], 348 U. S. 115 (1954).

Nor is the second defense legally supportable. Price differentials based on volume constitute price discriminations under the Robin-

son-Patman Act unless cost justified. 15 U. S. C. § 12(a); *American Motors Specialties Co. v. F. T. C.* [1960 TRADE CASES ¶ 69,712], 278 F. 2d 225 (2 Cir. 1960), cert. den. 364 U. S. 884.

We are convinced that the price discriminations practiced by AMPOT were a cause of injury to plaintiff. The higher profits gained by AMPOT on its small volume sales would necessarily have given defendant an illegal "edge" in its ability to undercut PE both on larger volume schedule sales and large volume bid sales. Though slight, this edge was not insubstantial. AMPOT's post-trial brief shows the following computations for schedule sales:

Year	% of total lbs. sold	% of total revenue
1966	12%	14%
1967	15%	18%
1968	8%	9%

AMPOT did not provide computations for 1969 and 1970 though an examination of the exhibits suggests that, at least for 1969, the percentages would be very substantially larger.

It is our conclusion that this "edge" gained by discriminatory pricing contributed substantially to AMPOT's ability to undercut PE's prices and to hold the sales price of large volume A/P at a below cost level, thus causing competitive injury to PE.

(C) *Large Volume Purchases*

The second claim under the Robinson-Patman Act is that the varying bid prices charged on nonscheduled large volume orders were price discriminations which caused competitive injury to PE.

There is no disagreement that the bid prices varied and AMPOT's evidence demonstrates that the bid price often varied on sales very close in time.

AMPOT proposes the affirmative defense that the low bids were made to meet competition. We find it unnecessary to consider

this defense for we are not persuaded that AMPOT's price differentials were the cause of PE's competitive injury.

Price differentials may cause competitive injury only if losses incurred by the low price sales are offset by sales made at higher prices. In the common territorial price discrimination the low prices charged in the geographical area of competition are offset by higher prices charged in geographical areas without competition. Similarly, in nongeographical discrimination, one seller may selectively undercut another on some sales while recouping his losses on other sales.

In the present case virtually all large volume sales were made at or below fully allocated cost. Any offset made by the slightly higher, though still below cost, sales was only an offset in the sense that the loss was smaller. Though in a proper case this lesser loss might provide the causal effect of injury to another competitor, we are not persuaded that it does so here.

The injury to PE was caused by the below cost sales, not by the slight variations in price of the below cost sales.

> "When a seller underbids a competitor, thereby injuring him, the injury is an 'effect' of discrimination only if the low price is supported by other prices and their profits wherever charged." *Shore Gas & Oil Co. v. Humble Oil & Refining Co.* [1964 TRADE CASES ¶ 70,990], 224 F. Supp. 922, 926 (D. N. J. 1963).

Though it is a permissible inference that below cost sales are supported by other sales, such is not the case here. The below cost bid sales were not supported by other above cost bid sales of A/P.[48]

The Robinson-Patman Act does not require that prices on goods be uniform. It only makes illegal the use of varying prices to destroy competition. Varying prices were not used for this pur-

48. The schedule sales provided some support, of course, but these have been treated separately.

pose here; below cost sales were the principal weapon used to destroy competition. Accordingly, we disallow PE's claim under the Robinson-Patman Act for large volume purchases.

UTAH UNFAIR PRACTICE ACT

PE's final claim is that a number of AMPOT's sales below cost were in violation of Section 13-5-7 of the Utah Unfair Practice Act. The pertinent part of this section reads as follows:

> "It is hereby declared that any advertising, offer to sell, or sale of any merchandise, either by retailers or wholesalers, at less than cost as defined in this act with the intent and purpose of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor or otherwise injuring a competitor, impairs and prevents fair competition, injures public welfare, is unfair competition contrary to public policy and the policy of this act and is declared to be a violation of this act."

This claim arises out of sales made to Thiokol's Wasatch Division which is located at Promontory, Utah. The transactions preceding sales commenced with Thiokol sending a RFQ to Kerr-McGee Chemical Corporation or its predecessor. This would be sent to the company's office in either Los Angeles or Oklahoma City. Kerr-McGee Chemical Corporation would respond with a written bid which would be considered by Thiokol. If the company decided to purchase Kerr-McGee Chemical Corporation's product, it would mail a contract. This contract would be mailed from Utah and received in either Los Angeles or Oklahoma City. Thiokol would then receive an acknowledgment copy from Kerr-McGee Chemical Corporation. Included within the contract was a standard provision stating acceptance would be at Thiokol's plant. The A/P, however, was to be shipped FOB Henderson, Nevada.

Even assuming[49] that Kerr-McGee Chemical Corporation offered or sold its A/P below cost within the State of Utah, we feel that the Utah statute is clearly inapplicable. There are many reasons for our belief; however, our discussion will focus only on the fact that the statute applies to retailers and wholesalers and not to manufacturers.

Although PE has tried to persuade us that the Utah legislature intended the word wholesalers to be given a broad interpretation, we are convinced otherwise. In *Burt v. Woolsulate* [1944-1945 TRADE CASES ¶ 57,217], 146 P. 2d 203, 205, the Utah Supreme Court discussed the reasons for the enactment of the various unfair practices acts. The court stated that "the immediate stimuli for the enactment of such acts were in part the rapid rise of chain stores and in part the general sharpening of competitive practices under pressure of the depression." Quoting from an article entitled "Prohibiting Price Discrimination and Sales Below Cost: The State Unfair Practices Acts," which appeared in 32 Ill. Law Rev. 816, the court stated:

> "One of the practices aimed at by these [unfair practices acts] statutes is that, common in chain stores, of selling at lower prices in one locality than in another and making up losses incurred by profits in other stores. Even more important in the application of anti-discrimination statutes today is the prevention of discrimination sales by manufacturers to customers with unusually strong bargaining power who can force large price concessions. * * *
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> "On the whole the anti-discrimination provisions of the Unfair Practices Acts seem best fitted to reach manufacturers and producers who, in the past have placed certain retail buyers in preferred competitive positions by giving them special rebates or other price favors. Enforcement at this

49. We assume these facts as neither party presented any persuasive law concerning where these offers and sales took place.

> point can be doubly effective under the 'Little Robinson-Patman Acts' which penalize not only the seller but the buyer who knowingly induces or receives discrimination in price."

Although the word "manufacturers" is used, it is clear that the purpose of the act was to protect the small independent merchant. It is equally clear that the below cost provision should not be applied to manufacturers. This latter point is set forth in the law review article mentioned above.

In this article, the following is stated:

> "While the wording of the sales below cost provisions in most of the statutes is broad enough in scope to include those engaged in business in all its various phases, the types of businesses to which laws of this sort can be successfully applied are necessarily limited. The acts are inadequate for application to manufacturer's sales because of the complex factors involved in determining cost."

The article further states:

> "A few of the acts do not extend the sales below cost provisions to manufacturers. In view of the fact that the most undesirable practices of manufacturers are eliminated by the anti-discrimination sections, it seems proper that they should be exempt from the sales below cost provisions."

The statutes cited as being inapplicable to manufacturers were those of Tennessee and Pennsylvania. The provisions of both declare that sales below cost by retailers and wholesalers are illegal when made with the requisite intent of injuring a competitor, etc. The Pennsylvania act specifically states that the term "wholesaler shall mean and include every person, partnership, corporation or association other than a manufacturer (not operating a retail business or trade) engaged in the business of making sales at wholesale or performing the wholesale function of supplying any retailer or retail outlet with merchandise for retail sale

within this State . . ." The Tennessee statute does not specifically state that manufacturers are not to be considered as wholesalers. The statute, however, defines sales at wholesale as including "any transfer, for a valuable consideration made in the ordinary course of trade or the usual prosecution of the seller's business, of title to tangible personal property to the purchaser for resale either in its original form or as processed or prepared for resale by hotels, cafes, or hospitals or other institutions," and cost to the wholesaler as meaning and including whichever is the lower of "(1) the purchase price of the product or commodity to the wholesaler when invoice is dated not more than sixty (60) days prior to the sale of such product or commodity by the wholesaler, or (2) the replacement cost of such product or commodity to the wholesaler at the time of sale in the quantity last purchased by the wholesaler; less any legitimate trade discounts but exclusive of cash discounts for prompt payment." Under these definitions, it would be impossible for the statute to be applicable to a manufacturer.

In light of the aforementioned, we are convinced that the 1955 amendment to Section 13-5-7 of the Utah statute which changed the wording from "[I]t shall be unlawful for any person engaged in business within the State of Utah to sell, offer for sale or advertise for sale any article, product or commodity at less than the cost thereof to such vendor . . ." to "[I]t is hereby declared that any advertising, offer to sell, or sale of any merchandise, either by retailers or wholesalers, at less than cost as defined in this act . . ." narrower the scope of the act and restricted its application. Webster's Third New International Dictionary defines a retailer as "a merchant middleman who sells goods mainly to ultimate consumers" and a wholesaler as "a merchant middleman who sells chiefly to retailers, other merchants, or industrial, institutional, and commercial users mainly for resale or business use." These are the publicly accepted meanings, and we feel they are the definitions intended by the Utah legislature.

PE would have us consider Section 13-5-7(b)1 which says, "When used in this act, the term 'cost' as applied to production shall include the cost of raw materials, labor, and all overhead expenses of the producer" as indicating that Section 13-5-7 is applicable to manufacturers. However, if a manufacturer is to be considered as a wholesaler, then Section 13-5-7(b)2 which says, "When used in this act, the term 'cost to the wholesaler' shall mean the invoice cost of the merchandise to the wholesaler or the replacement cost of the merchandise to the wholesaler, whichever is lower; less all trade discounts except customary discounts for cash; to which shall be added: (a) Freight charges not otherwise included in the invoice cost or the replacement cost of the merchandise as herein set forth, and (b) cartage to the retail outlet if done or paid for by the wholesaler, which cartage cost, in the absence of proof of a lesser cost, shall be deemed to be three-fourths of one per cent of the cost to the wholesaler as herein set forth after adding thereto freight charges but before adding thereto cartage" would be the appropriate section to apply. This definition surely cannot be applicable to a manufacturer such as Kerr-McGee Chemical Corporation. As far as Section 13-5-7(b)1, which became part of the statute in 1939, is concerned, we can only surmise that it was rendered meaningless by the 1955 amendment. Although we have little doubt that wholesaler could be defined broadly enough to include a manufacturer, we are convinced that this is not the case and we dismiss this claim.

COUNTERCLAIMS

[*Securities*]

The defendant has filed three counterclaims. The first arises out of events surrounding a fully registered offering of PE's stock which began in February 3, 1970. All of the stock was sold by February 6, 1970, and the offering was closed on February

27, 1970. Kerr-McGee claims that PE's subsequent lawsuit[50] "was used as a vehicle for the promotion of the sale of plaintiff's high risk stock prior to and during the term of the offering, and as a psychological tool to maintain the after market at high levels." Defendant's pretrial brief at pp. VII6-7. Kerr-McGee claims this conduct violated Section 10(b) of the Securities Exchange Act of 1934 and its implementing Rule 10b-5. Specifically, defendant claims the violation occurred when PE did not disclose the potential suit in its registration statement and then allegedly "leaked news of its intentions" to sue Kerr-McGee in order to stimulate the sale of its stock. Defendant maintains this conduct constituted a manipulative, deceptive, or other fraudulent device or contrivance and that "defendants have been damaged by such fraudulent conduct in that they have been put to great expense in the defense of his lawsuit . . ."

Assuming this claim is timely, we must dismiss it as being clearly without merit as the record is void of any proof that PE or its underwriters used the possibility of a suit as a means of selling the stock. Even if such proof existed, and we assume the required "casual connection",[51] there is absolutely no injury to Kerr-McGee. The injury suffered by the defendant as a result of this suit and the damages to be incurred are the direct result of AMPOT's illegal activities and not the plaintiff's stock offering.

[*Price Discrimination*]

The second counterclaim is that PE violated the Robinson-Patman Act by its price discriminations, both in higher prices charged small volume buyers and varying prices charged large volume buyers.

We find that PE did discriminate in price, but Kerr-McGee has not met its burden of showing competitive injury. In light of

50. The approval to commence this suit was given by PE's board of directors on February 26, 1970.

51. An assumption which is probably not warranted by the facts of this case.

our other findings as to AMPOT's attempt to monopolize, monopoly power, and price discrimination, a showing of competitive injury would be very difficult. PE may have, in individual cases, discriminated in price and, by so doing, taken from AMPOT business that it would otherwise have had. But the effect of taking business from a monopolist is not "substantially to lessen competition, or tend to create a monopoly in any line of commerce . . ." Indeed, it has the opposite effect.[52]

[*Requirements Contract*]

Kerr-McGee's final counterclaim is that PE, Thiokol, and Aerojet entered into a secret agreement by the terms of which Thiokol and Aerojet undertook to purchase at least one-half of their A/P requirements from PE at a premium price that this agreement violates Section 1 of the Sherman Act[53] and Section 3 of the Clayton Act.[54]

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52. We express no opinion as to whether PE would be able to defend an action brought by buyers who suffered as the result of PE's price discrimination.

53. "Every contract, combination in the form of trust or otherwise or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . ." 15 U.S.C. § 1.

54. "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee of purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or trend to create a monopoly in any line of commence." 15 U.S.C. § 14.

[Group Boycott]

The basic contention is that the alleged agreement operated as an illegal group boycott of Kerr-McGee Chemical Corporation's A/P or that of its predecessor, AMPOT.

The events surrounding this claim began in 1966 when Thiokol and Aerojet requested a meeting with PE. These companies made this request as they were worried about developments within the A/P industry. Specifically, they were concerned about the possibility of AMPOT becoming the sole supplier of A/P if PE should be forced out of the market. The meeting was held on September 16, 1966, in Henderson, Nevada. Representatives from Thiokol, Aerojet and PE were in attendance.

The major discussion centered around how PE could settle its pending lawsuit with American Cyanamid and remain in business. Everyone present apparently realized that, in order to save PE, Thiokol and Aerojet would have to purchase approximately 50% of their A/P requirements from PE at a premium price during the next five years.

Shortly after the meeting, both companies independently notified PE of their intention to support the company. On September 20, 1966, PE received a telegram from Stoner of Thiokol. The telegram informed PE that Thiokol would dual source its A/P during the next five years and that the company would purchase 4,000,000 pounds of A/P from PE each year. The price was stated to be that listed in the telegram, or less. The prices[55] were listed as 19.5 cents per pound for 1967 and 1968; 20 cents per pound for 1969 and 1970; and 20.5 cents per pound for 1971 and 1972.

On November 18, 1966, Johnson of Aerojet wired PE that, subject to the approval of the premium by its customer, Aerojet would purchase approximately 3,000,000 pounds of A/P each year from PE. The prices which Aerojet stated that it would pay

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55. The prices offered by both companies gave the plaintiff a 3 to 4 cents per pound premium over the market price.

were 21.5 cents per pound in 1967 and 1968; 22 cents per pound in 1969 and 1970; and 22.5 cents per pound in 1971.

Thiokol evidently revised its figures concerning the quantity of A/P it would purchase from PE as, on January 13, 1967, PE was advised that Thiokol would purchase 40% of its 1967 and 1968 A/P requirements from it.[56] One of Thiokol's internal communications concerning this situation stated that the company was dual sourcing for the purpose of retaining capability and providing insurance against monopolistic pricing by AMPOT.

This 10% reduction of the allegedly agreed upon percentage of Thiokol's A/P business which PE was to receive indicates that the alleged accord was more of an expression of intention than any firm arrangement. This is also indicated by a statement made by Ritchey in an internal memo dated January 18, 1967. Ritchey, in discussing Thiokol's dual sourcing policy, stated that "Aerojet and United Technology are reported to be willing to make similar agreements in order to keep them in business."

Perhaps the most persuasive evidence that a firm agreement did not exist is the fact that PE received little of Thiokol's and Aerojet's business during the pertinent years. PE admitted that, pursuant to its policy, Thiokol made three purchases of Class I A/P and two purchases of Class II A/P in 1967 and 1968. These five purchases amounted to 2,727,500 pounds of A/P. PE also admits that Aerojet made two purchases of Class I A/P and one of Class II A/P during these two years. These three sales amounted to 820,000 pounds of A/P. We have not found any other sales which were made pursuant to Thiokol's and Aerojet's dual sourcing policies, and it is abundantly clear[57] that these purchases did not represent 50% or 40% of either Thiokol's or Aerojet's purchases.

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56. There is some uncertainty whether the 40% was to be 40% of all Thiokol's A/P requirements or just its Minuteman requirements. The difference, however, is immaterial to our decision.

Although the evidence does not warrant the inference that there was any firm agreement among Thiokol and Aerojet, the facts still present a unique situation and there does not appear to be any authority precisely on point.

Kerr-McGee claims that the alleged agreement had the effect of excluding its product from a portion of the market and forcing the company to sell at a lower price than PE was obtaining for its A/P which was not subject to the boycott. We reject the second aspect of this claim as we have previously found that Kerr-McGee had the power to raise the price of A/P. As far as the claimed group boycott, Kerr-McGee relies on *Klor's, Inc. v. Broadway-Hale Stores, Inc.* [1959 TRADE CASES ¶ 69,316], 359 U. S. 207 (1959), as its primary authority.

In *Klor's,* the defendant operated a chain of department stores, one of which was located next door to plaintiff's store in San Francisco. Plaintiff claimed that the defendant, ten national manufacturers, and their distributors agreed among themselves that the manufacturers and distributors either would not sell to the plaintiff or would only sell to it at discriminatory prices and unfavorable terms. The question before the court was whether plaintiff's claim stated a cause of action. The court felt that the allegations were sufficient as they alleged a form of trade restraint and public harm which the Sherman Act forbids.

The court found that a cause of action existed and stated (359 U. S. 212-13):

> "Alleged in this complaint is a wide combination consisting of manufacturers, distributors and a retailer. This combination takes from Klor's its freedom to buy appliances in an open competitive market and drives it out of business as

57. AMPOT admits that it sold 17,240,000 pounds of A/P in 1967 and 14,040,000 pounds in 1968, while PE sold only 4,020,000 pounds in 1967 and 1,850,000 pounds in 1968. These admitted statistics, together with the fact that U. T. C. was buying almost exclusively from PE, clearly indicate that AMPOT was getting the predominant share of Thiokol's and Aerojet's business.

> a dealer in the defendants' products. It deprives the manufacturers and distributors of their freedom to sell to Klor's at the same prices and conditions made available to Broadway-Hale, and in some instances forbids them from selling to it on any terms whatsoever. It interferes with the natural flow of interstate commerce. It clearly has, by its nature and character, a monopolistic tendency."

Manifestly, the situation in the case at bar is far different from the one in *Klor's*. In the present case there is no dominant economic power trying to drive a small competitor out of business and here, even if there was an agreement, the purchasers were free to deal with AMPOT. In fact, as was previously mentioned, AMPOT received the overwhelming majority of the A/P business during 1967 and 1968. It is also evident that although Thiokol and Aerojet may have intended to follow a policy of dual sourcing there was nothing to compel them to do so. In fact, even Thiokol's support prices were subject to negotiation. We do not feel this situation can be characterized as a group boycott such as was in *Klor's*.

[*Exclusive Dealing*]

The plaintiff's primary theory is that, if anything, the alleged agreement was an exclusive dealing arrangement, and it relies on *Tampa Electric Co. v. Nashville Coal Co.* [1961 TRADE CASES ¶ 69,940], 365 U. S. 320 (1961), to establish the legality of such arrangements. *Tampa* does indeed stand for the proposition that an exclusive dealing arrangement does not violate Section 3 of the Clayton Act unless the court believes it probable that the performance of the contract would foreclose competition in a substantial share of the line of commerce affected. In *Tampa,* the court held that a twenty-year requirement contract between a coal producer and a utility company was permissible. Although plaintiff's authority may be closer to our factual situation than defend-

ant's, it also falls short of the mark as we have a situation with more than just a single buyer and a single seller. In addition, we cannot see how the dual sourcing policy can operate as a requirement contract since there were not any enforceable contracts requiring Thiokol and Aerojet to purchase A/P from PE.

[*Governing Law*]

Although neither plaintiff's nor defendant's primary authorities are appropriate, there is one case cited by PE which we feel contains the governing law. This case is *Joseph E. Seagram and Sons, Inc. v. Hawaiian Oke and Liquors, Ltd.* [1969 TRADE CASES ¶ 72,914], 416 F. 2d 71 (9 Cir. 1969). In this case, Hawaiian Oke, a wholesale liquor distributor in Hawaii, claimed that Joseph E. Seagram and Sons, Inc. and Barton Distilling Co., manufacturers of alcoholic beverages, and McKesson and Robins, Inc., a wholesale liquor distributor, combined or conspired to, and did, put it out of business. The plaintiff had been the sole distributor in Hawaii of most of Seagram's and Barton's products until both manufacturers switched their business to McKesson and Robins. Hawaiian Oke claimed this constituted a group boycott. The court assumed that there was an understanding between Seagram, Barton and McKesson that both manufacturers would transfer their business to McKesson but held that this did not constitute a group boycott. The court stated that not every agreement is *per se* "in restraint of trade" within the meaning of Section 1. It added further that "a manufacturer or supplier can do many things independently which he may not combine with others to accomplish . . . but the mere fact of combination or conspiracy does not necessarily result in *per se* liability." In discussing the group boycott cases cited by plaintiff,[58] the court said, "Such boycotts have been held to be illegal *per se* under Section One

58. Kerr-McGee relies on many of these same cases.

because they are naked restraints of trade with no purpose except stifling of competition . . ." and that "in all of plaintiff's cases there was a purpose either to exclude a person or group from the market, or to accomplish some other anti-competitive objective or both."

The court felt there was nothing in the situation facing it which was comparable to the group boycotts in the cases Hawaiian Oke relied upon and that the proper considerations were those stated by Barber in "Refusals to Deal under the Federal Antitrust Laws", 103 U. of Pa. L. Rev. 847 (1955), at 876-77:

> "When the element of purpose to coerce the trade policy of their parties or to secure their removal from competition is absent, the policy question raised by agreements under which the parties mutually limit their own freedom to deal with outsiders becomes more difficult, and the courts have appropriately outlined wider limits before declaring such agreements illegal.
>
> "There are many 'normal and usual agreements in aid of trade and commerce' . . . which involve the acceptance by the parties of limitations on their freedom individually to deal with others . . . Requirements contracts, exclusive dealing contracts and contracts involving exclusive territories all involve limitations on the freedom of one or more of the parties to do business with others . . .
>
> "Because all of these situations involve an agreement between two or more persons under which one or more of them agree not to deal with third persons and for that reason foreclose a part of the market to such third persons, they are all subject to scrutiny under the antitrust laws. But in the ordinary case these do not involve combining for the primary purpose of coercing or excluding; rather they involve combinations of two or more persons to further directly the business of the parties to the agreement, and the effect on third parties and on competition is indirect. The issue in these cases is not the existence or nonexistence of concerted refusal to deal, but rather whether the purpose and effect of the operation of the contract, association,

exchange or joint sales agency was such as unreasonably to exclude outsiders from participation in the trade in question. The principle of the group boycott cases—that it is prima facie unreasonable for a dominant group to combine to coerce—is not here applicable."

We feel the same considerations are applicable in the present case, and as in *Seagram,* there is no evidence to show any anti-competitive motives on the part of Thiokol, Aerojet or PE. As Aerojet and Thiokol both admitted, they were only concerned with the existence of two sources of A/P. And, as previously mentioned, there was not even a firm agreement as the defendant had 80% of the A/P business in 1967 and 88% in 1968. Thus, it is inconceivable that a group boycott could have existed. Even if there had been an effective agreement, this would have left AMPOT with 50% to 60% of Thiokol's and Aerojet's business, and this certainly cannot be considered as any type if combination in restraint of trade or commerce, or as an agreement which might substantially lessen competition or tend to create a monopoly in any line of commerce.[59] Therefore, we find defendant's claim to be without merit.

Conclusion

Having found for the plaintiff on certain issues presented, the case is now ready for a determination of damages. However, if the Court has erred in any conclusion with respect to a particular issue touching liability, the damages could not properly be ascertained. The Court, being of the opinion that any order hereafter entered pursuant to this opinion involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from such order may materially advance the ultimate termination of the litigation, will so certify in writing.

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59. It might be noted that the present SAMSO agreement adopts just such a dual sourcing approach.

An order in accordance with this opinion will be prepared by counsel and, upon endorsement, will be entered. Such order shall be presented within sixty (60) days unless time is further extended by order of Court.

Appendix C

[¶ 60,724] Pacific Engineering & Production Co. of Nevada v. Kerr-McGee Corp. and Kerr-McGee Chemical Corp.

U. S. District Court, District of Utah, Central Division. Civil Action No. C-40-70. Filed February 2, 1976; corrected February 17, 1976.

Sherman and Clayton Acts

Private Enforcement and Procedure—Proving Damages—Monopolization—Hypothetical Profits—Lack of Competitors for Comparison—Changed Demand and Competitive Situation.—Expert opinion on hypothetical profits was the proper method for determining damages resulting from monopolization of the ammonium perchlorate (used in rocket fuel) industry. The demise of other competitors (only the plaintiff and defendant were producing at the time of trial) largely eliminated the "yardstick" or comparison method of estimating the amount of loss, and the "before and after theory" had only limited value in an industry with great changes in demand and the competitive situation at the inception of the damage period. See ¶ 9302.

Private Enforcement and Procedure—Proving Damages—Economic Outcome in Absence of Monopolization—Price Leadership Oligopoly.—Given the fact that the two producers of ammonium perchlorate (used in rocket fuel) would have experienced steadily declining marginal costs because of their excess capacity and ability to supply the total market demand, economic theory suggested that, had not one firm unlawfully monopolized the market, a situation either of successful price leadership or of failed price leadership with price wars and eventual monopoly would have resulted. The difference in damages was so great between the situations of successful and failed price leadership that the plaintiff had the burden of proving that a price leadership oligopoly would have been the probable result in the absence of monopolization and in the absence of illegal agreements between the producers as to price and market shares. This burden was sustained despite

the presence of numerous factors, such as sharp and questionable procurement practices by customers, that would have made the maintenance of price leadership difficult. See ¶ 9302.

Private Enforcement and Procedure—Proving Damages—Price in Absence of Monopolization—Actual v. Theoretical Price.—In determining what the actual price of ammonium perchlorate (used in rocket fuel) would have been in the absence of monopolization, assuming a situation of price leadership, the following considerations were germane: (1) the monopolizer's cost of production; (2) the oligopolistic nature of the industry; (3) the characteristics of the buyers; (4) the fact that demand was set by government policy rather than market forces; (5) the overcapacity present in the industry; and (6) the possible re-entry into the market of another producer. These considerations led to the conclusion that the price for the rocket fuel ingredient would not have varied significantly during the first part of the damage period from previous levels. Thereafter, the assumed condition of price leadership would have required fairly stable pricing. It also appeared that volume would not have changed significantly. Arguments that the proper price for determining damages was the "lowest lawful price" or a price that would have resulted in a reasonable profit were largely irrelevant. See ¶ 9302.

Private Enforcement and Procedure—Proving Damages—Monopoly Victim—Stock Losses—Ability to Raise Capital in Future.—A producer of ammonium perchlorate (used in rocket fuel) was not permitted to recover damages for the additional number of shares of stock that it had to offer as the result of a competitor's monopolization of the industry. The loss suffered was neither the loss of the firm as a going concern, nor the loss to its stockholders by the dilution of their stock. The loss, if any, was impairment of the firm's ability to raise capital in the future. A lack of substantial evidence on this loss precluded recovery. See ¶ 9302.

Private Enforcement and Procedure—Attorney's Fees and Costs —Counterclaims—State Law Claims—Paralegal Work—Risk Factor.—Monopoly plaintiffs were awarded attorney's fees for time spent on closely interwoven counterclaims and a novel and unsuccessful, though not spurious, claim for losses on stock transactions. There was no award for time spent on unsuccessful claims under state antitrust law and on an abandoned unfair trade count. Recovery also was denied for work done by paralegals and law clerks. Furthermore, paralegal fees could not be considered "costs of the suit." Such fees could be treated, rather, as items of overhead and thus a factor in the hourly rate of the attorney. Moreover, a risk factor to double the award was not appropriate, since the suit was not a class action. Costs covering court reporter fees, deposition costs, witnesses' mileage and attendance fees, and fees for copying also were awarded. See ¶ 9320.

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Memorandum Opinion

HOFFMAN, D. J.: The liability phase of this bifurcated antitrust case was decided in an opinion, as supplemented, dated February 28, 1974, with an interlocutory appeal by defendants being thereafter denied. In that opinion this Court concluded that defendants had violated the Sherman and Robinson-Patman Acts [1974-1 TRADE CASES ¶ 75,054]. The sole remaining issue is the amount of damages to which plaintiff is entitled.

Title 15 U. S. C. § 15 fixes the recovery at "threefold the damages by him (plaintiff) sustained." The damages are the difference between plaintiff's economic position as a result of the antitrust violations and what plaintiff's economic position would have been, absent the antitrust violations. They are plaintiff's pecuniary losses as a result of the violations, *Twentieth Century Fox Film Corp. v. Brookside Theater Corp.* [1952 TRADE CASES ¶ 67,218], 194 F. 2d 846 (8 Cir. 1952), cert denied, 343 U. S. 542. The task of the Court then is to determine what would have been rather than what was. That task necessarily involves inference, hypothesis, and extrapolation. In arriving at the damage the Court may not rely on mere speculation or guesswork, *Loew's, Inc. v. Cinema Amusements, Inc.* [1954 TRADE CASES ¶ 67,648], 210 F. 2d 86 (10 Cir. 1954), cert. denied 347 U. S. 976, but where the difficulties in arriving at a damage figure are the result of defendants' illegal actions, the defendants must bear the burden of the imprecision in proof. *Bigelow v. RKO Radio Pictures* [1946-1947 TRADE CASES ¶ 57,445], 327 U. S. 251 (1946). In short, the guess must be an educated one, and the plaintiff has the burden of providing the Court with the necessary education.

[*Methods for Estimating Loss*]

Three methods have evolved for estimating the amount of loss in antitrust cases. The "before and after theory" compares the earnings of the enterprise before the violation with those after. The "yardstick" method compares the earnings of the affected enterprise with those of an unaffected enterprise. Finally, expert evidence may be used to estimate the hypothetical gross receipts of the enterprise in the absence of antitrust violations, and derive from these the hypothetical profits of the enterprise. Timberlake, *Federal Treble Damage Antitrust Actions*, p. 317 (Callaghan, 1965); *Flintkote v. Lysfjord* [1957 TRADE CASES ¶ 68,674], 246 F. 2d 368, 392 (9 Cir. 1957).

The value of the first two methods is slight in this case. The demise of other competitors largely eliminates the "yardstick" method, and the "before and after theory" has only limited value in an industry with great changes in demand and the competitive situation at the inception of the damage period, see, Memorandum Order of November 18, 1974. Thus plaintiff is forced to rely largely on expert opinion to butress plaintiff's assertions as to damages. That expert opinion must provide answers to two questions:

1. What would have been the price plaintiff would have received for ammonium perchlorate absent defendants' unlawful conduct?
2. What volume of sales would defendants have had absent defendants' unlawful conduct?

[*Normal Economic Outcome*]

It is perfectly possible that normal business factors would have resulted in plaintiff having been almost driven out of business in a pricing pattern closely similar to that which actually occurred. Economic theory suggests this could be the result of the situation that existed in the ammonium perchlorate industry.

[*Declining Marginal Costs*]

Both plaintiff and defendants possessed excess capacity and either could have substantially supplied the total market demand during the damage period. This being the case, each company would have found that the marginal cost of producing additional quantities of ammonium perchlorate would steadily decline.[1] The more ammonium perchlorate produced, the less the cost of production. Given that fact, both firms could engage in a price war, hoping always that with increased volume their lower costs per

1. Marginal cost is defined as the additional cost of producing an additional unit of production.

unit would permit their lowered price to cover their average total costs.

Professor Samuelson in his text, *Economics,* p. 452 (McGraw Hill, 8 Ed. 1970), describes such a situation:

> Actually, if we review our argument telling us why a maximizing firm will want to produce where MC = P [Marginal Cost = Price], we see that the argument *fails completely* in the case where the firm's MC curve is a downward-sloping one. For if you move to the right of a point on a falling MC curve, you find that your additional P per unit is in excess of the now lower MC; and so in the case of decreasing Marginal Cost, the firm will expand its output more and more beyond the MC curve to gain extra profit.
>
> Under decreasing Marginal Cost, the first firm to get a head start will find its advantage increasing the greater it grows. As it forces other firms to contract their q's [volume] their disadvantage will become aggravated as they are forced to travel back up their falling MC curves. The result must be obvious . . . .

Samuelson's obvious result is (1) the destruction of all but one firm and the creation of a monopoly; (2) the creation of an oligopoly; (3) some kind of "imperfect competition" wherein the firms have control over industry price.

[*Price Leadership*]

The obligopoly (or, in this case, duopoly) result or the "imperfect competition" result theorized by Samuelson would have been the actual result if "price leadership" had been attainable in the ammonium perchlorate industry. "Price leadership" is a common situation in oligopolistic industries such as steel, tobacco, automobiles and aluminum. Under price leadership, the pricing decisions for the industry are made by one or more dominant firms and the other firms follow that price making a smaller or larger profit than the leader depending on their individual costs.

Price leadership is not the idealized competitive free enterprise system favored by our economic philosophy. It can be, however, a legal marketing structure in an industry, *Theater Enterprises, Inc. v. Paramount Film Distributing Corp.* [1954 TRADE CASES ¶ 67,640], 346 U. S. 537 (1954); *United States v. National Malleable & Steel Castings Co.,* 1957 TRADE CASES ¶ 68,890 (N. D. Ohio 1957), aff'd *per curiam* [1958 TRADE CASES ¶ 69,154] 358 U. S. 38 (1959).

[*Three Possible Outcomes*]

Implicit in price leadership is the division of the market into relatively stable shares. Given the situation of the ammonium perchlorate industry, there were three possible outcomes of the market conditions at the start of the damage period in this case:

1. Defendants could decide that they would recoup the losses of a price war by monopoly pricing and could actively pursue the acquisition of a monopoly.

2. Price leadership oligopoly could be attempted and fail, resulting in a price war with eventual acquisition of a monopoly by defendants because of defendants' superior financial resources.

3. Price leadership oligopoly could be attempted and succeed with a relatively stable price and a division of the market.

In the liability opinion we determined that defendants consciously chose and implemented the first outcome, thereby violating the antitrust laws. Had it not done so, either the second or third outcome would have been the result. If the result is the second outcome, then there are little or no damages to the plaintiff. If the result is the third outcome, then plaintiff's damages are the difference in the profits it actually had received compared to the profits it could have had under the third outcome.[2]

[*Burden of Proof*]

Plaintiff suggests that the uncertainty as to whether the second or third outcome would have been the actual outcome is the result

of defendants' illegal acts and thus defendants must accept the burden of uncertainty, citing *Bigelow v. RKO Radio Pictures, supra,* and other cases in that line of decisions. That legal theory as to the measure of proof is not, however, applicable in choosing between the second outcome where there would be little or no damages and the third outcome where there would be substantial damages. As stated in *Story Parchment Co., supra:*

> It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount.

Accord, *Kobe, Inc. v. Dempsey Pump Co.,* [1952 TRADE CASES ¶ 67,312], 198 F. 2d 416, 426-27 (10 Cir. 1952), and cases cited therein.

Though concededly there could have been some minimal damage under the second outcome,[3] the disparity is so great between the second outcome and the third, and the damage assessment so different, that the burden remains with the plaintiff to show by a fair preponderance of the evidence that a price leadership oligopoly would have been the probable result in the absence of defendants' unlawful conduct and in the absence of illegal express agreements between plaintiff and defendants as to price and market shares.

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2. In addition plaintiff would be entitled to any loss in the value of its property. *Story Parchment Co. v. Paterson Parchment Co.,* 282 U.S. 555 (1931).

3. The rate of monopolization might be different between an intentionally implemented monopoly policy, and monopoly that was the incidental result of a protracted price war. Thus there might be some minimal damage due plaintiff if the second outcome occurred rather than the first.

[*Maintenance of Price Leadership*]

The evidence shows that ammonium perchlorate costs vary markedly with volume, that both firms had large excess capacity, that most buying of ammonium perchlorate was by sealed bid, that the major buyers practiced sharp and questionable procurement policies that included the misrepresentation of the amounts of other manufacturers' bids, and that many procurements were made for contract amounts that were large portions of the total available business. Each of these factors would make the maintenance of price leadership difficult.

Countervailing considerations include plaintiff's desire to have a price leadership situation, the advantages to plaintiff and defendants of a price leadership situation, and at least partial support among the buyers for dual sourcing. Plaintiff's president, Fred Gibson, has consistently testified in both the liability and damage phases of this case that he desired a price leadership situation, that he was aware of the necessity of following and not undercutting defendants' prices in order for price leadership to work, and that he would in fact have followed defendants' prices so long as they were at a level where plaintiff could make a profit. For a substantial period plaintiff in fact maintained its prices at a level above defendants' bid range in an attempt to "signal" plaintiff's willingness to end the price war and accept the price leadership of defendants, Liability Opinion p. 42, 46-47. This attempt to institute price leadership resulted in very substantial losses of business (Liability Opinion p. 17, ¶ e; Defendants' Exhibit 707A, pp. 8-10). Both the Government and the rocket manufacturers had a strong desire to maintain two sources of ammonium perchlorate, a desire that eventually ended in an artificial division of the market and price maintenance under the SAMSO agreement. That desire sprang from the danger of having only one manufacturing facility of a highly explosive substance and an unwillingness to be subjected to a monopoly. The desire

may have been more in the abstract than the real during the damage period, for while wishing to have two sources, the sharp buying practices of most buyers made more likely the eventual monopoly,[4] but presumably that desire would have permitted a certain tolerance of price leadership so long as the price was not set at an unreasonably high level.

Price leadership would have been more advantageous to both firms than the price war that existed, though it might not be more advantageous to defendants over the long run than the monopoly profits they might be able to realize after victory in the price war.

Based upon these facts and the evidence in this case, it is our conclusion that plaintiff has shown by a preponderance of the evidence that, absent defendants' unlawful conduct, a price leadership type of pricing could and would have existed in the ammonium perchlorate industry.

Price

Having determined that a price leadership pricing situation would have existed in the ammonium perchlorate industry, we must now determine what the price would have been as a result of that situation. Defendants have asserted that the proper determination of price would be a determination of the "lowest lawful price" that defendants could have set. For determining that price, defendants rely on the reasoning of a law review article, Areeda and Turner, *Predatory Pricing and Related Practices under Section 2 of the Sherman Act,* 88 Harvard L. Rev. 697 (1975),[5] to show that the lowest lawful price would have been a price

4. The desire for dual sourcing was partially converted into practice by awards to plaintiff when its bid was not low for the purpose of maintaining competition by keeping plaintiff in business. See Defendants' Exhibit 707A.

5. The theory spoused in the Areeda and Turner article has been accepted by the Fifth Circuit, *Int. Air Industries v. American Excelsior, Inc.*, 1975-2 TRADE CASES ¶ 60,447 (5 Cir. August 18, 1975).

equal to the marginal cost of production. Plaintiff has at least partially argued that the price would have been a reasonable profit based on a profit to sales ratio, profit to capital ratio, or profit to cost ratio, and has supported this argument with the testimony of an expert, Dr. Arthur Burns, as to these rates in Government contract work and the chemical industry.

We think both lines of argument are largely irrelevant. The criteria for the price of ammonium perchlorate in fixing damages is neither the lowest lawful price nor a reasonable return or reasonable profit. The criteria is what the price would actually have been.

> A wide range of factors influence a company's pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state whether, had one fact been different (a single supply less expensive, general economic conditions more buoyant, or the labor market tighter, for example), he would have chosen a different price. Equally difficult to determine, in the real economic world rather than an economist's hypothetical model, is what effect a change in a company's price will have on its total sales. Finally, costs per unit for a different volume of total sales are hard to estimate.
>
> *Hanover Shoe, Inc. v. United Shoe Machinery Corp.* [1968 TRADE CASES ¶ 72,490], 392 U. S. 481, 492-93.

Economic theories that fail to take into account the specific circumstances of what was a highly atypical industry are of minimal aid in that determination.[6]

Even if the lowest lawful price were the criteria, the Areeda and Turner article is inapplicable in this case. Areeda and Turner rest their theory of lawful pricing on the economic theory that maximum profit (or minimum losses) are obtained when the

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6. Dr. Burns' testimony is of some value as to what the Government might regard as a maximum price, above which it might act to reduce the price.

marginal cost of production equals the price. That theory is only valid when the marginal cost follows the typical pattern of first decreasing as output increases (because the manufacturer is able to utilize his excess capacity), and then increasing with further output (because the plant exceeds optimum efficient production rates or because it becomes necessary to make further capital outlays). In the ammonium perchlorate industry excess capacity was so great that the marginal cost would never increase with any possible quantity of demand.[7] As Professor Samuelson stated in the portion of his text previously quoted: "Actually, if we review our argument . . . telling us why a maximizing firm will want to produce where MC = P [Marginal Cost equals Price], we see that the argument *fails completely* in the case where the firm's MC curve is a downward sloping one." The profit maximization theory relies on the fact that P = MC is a break-even point in the sense that previous volumes of output will show a profit because the marginal cost was less than the price, and increases in output above this point will show a loss because the marginal cost will be greater than the price. If the marginal cost curve always declines and one prices at marginal cost, one will never have previous lower marginal cost output to make a profit on, and there will be a loss equal to the fixed costs. Accordingly, we reject the reasoning of the Areeda and Turner article as applied to the facts of this case.

We think the following considerations are all germane in determining the price that would have been realized for ammonium perchlorate:

1. Defendants' cost of production.
2. The oligopolistic nature of the industry.
3. The characteristics of the buyers.
4. The fact that demand was set by Government policy rather than market forces.

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7. The demand maximum was largely fixed by Government defense policy and thus had a limit largely unresponsive to price.

5. The overcapacity present in the industry.

6. The possible re-entry into the market of Pennsalt and Hooker Chemical Co.

[*Cost of Production*]

Defendants' cost of production is an important factor in pricing, if for no other reason than that a profit is the goal of all manufacturers. There is little disagreement between the parties as to the figures for determining defendants' cost. (Compare Plaintiff's Exhibit 1205 with Defendants' Exhibit 1451.) Defendants' fully allocated cost of ammonium perchlorate ranged from about 17 cents per pound in 1970 to about 21½ cents per pound in 1966, with a fixed cost of about $850,000 a year and a variable cost per pound of from 12 to 14 cents (Plaintiff's Exhibit 1205).

[*Depreciation*]

Defendants suggest that the use of rate of depreciation values carried on defendants' books for tax purposes is inappropriate since these may exceed the actual depreciation and thereby inflate the fixed costs. The argument has merit, but where the depreciation values are derived from defendants' own books, records and reports, it is defendants' burden to show the depreciation to be other than that which it has previously publicly maintained it to be. Defendants have not met this burden.

Defendants also contend that the inclusion of all depreciation as fixed costs is inappropriate because these costs reflect an error of judgment in the past when over-capacity was purchased and should be partially or wholly written off as a sunk cost. Similarly, the figure of interest represents a past decision to debt finance and should also be regarded as a "sunk cost" and not part of the basis for the cost of production of ammonium perchlorate. The short answer is that these costs, whether the result of past correct decisions or past erroneous decisions, must be

recovered if the business is to show a profit. The businessman who regards these costs as "water over the dam" and neglects them in determining price will find that financial solvency has also flowed over the dam. To avoid a loss defendants had to price so as to recover their average total cost (the sum of fixed and variable costs per pound) and this figure would be the same as their fully allocated cost per pound.

Defendants' own records show that, in general, they made price estimates on the basis of average total cost prior to the damage period. Absent predatory intent and other factors, defendants would have probably continued to attempt to price on that basis.

After the withdrawal of Hooker and Pennsalt from the market an oligopoly, or more precisely a duopoly, existed. Samuelson characterizes the possible pricing in oligopolies as follows:

> The richness of possible outcomes would exhaust a specialized book on the subject. The final equilibrium may end up much or little above the firm's marginal cost level . . . But if sellers are few, and if they are large relative to the total demand, not very fearful of new entrants, and keenly conscious of the mutuality of their interest, the tacit price pattern may become a very high one relative to long run or short run marginal cost. Samuelson, op. cit., p. 492.

Given the situation in the ammonium perchlorate industry we think the oligopolistic nature would tend (1) to make prices lower for an initial phase of the damage period while both producers effectively competed, and (2) make prices higher after both firms realized their mutuality of interest and perceived the pricing and market share division expectations of each other. The probability of an equilibrium point above cost is high. Once we foreclose the possibility of defendants' initiating and maintaining a price war for the purpose of becoming a monopoly and recouping their price war losses by monopoly profits, it becomes defendants' inter-

est to avoid the losses of a price war. Setting of the price (and division of the market) at a level below that where plaintiff could survive would be the trigger for plaintiff to cut its prices in the hope of increasing its market share, thereby lowering its cost per pound and hopefully lessening its losses. Such a move by plaintiff would, in the end, be suicidal, since defendants with superior financial resources would cut and maintain their prices below plaintiff's prices, but at some point in pricing and market share, plaintiff would be forced into the suicidal move. Thus it would be to defendants' advantage to maintain prices above those where plaintiff could not survive. Once that is the case, it becomes in defendants' interest to maintain prices as high as possible, the limit on pricing becoming an external one which depends on other factors such as Government regulation and the negotiating power of the buyers.

[*Buyer Strength*]

The rocket manufacturers have shown themselves to be shrewd buyers in a market which could fairly be characterized as a buyer's market because of the large overcapacity present in the industry. Nevertheless, the buyers' desire to maintain two sources of ammonium perchlorate would have induced them to accept the necessity of a price leadership situation, so long as they were not paying much above the minimum price necessary to maintain two sources of ammonium perchlorate. The economic strength of the buyers would have been an important upper limit on the price of ammonium perchlorate.

[*Government-Set Demand*]

In classic economic theory a closely dependent relationship exists between price, supply, and demand. In the ammonium perchlorate industry this relationship was not present. Demand was set by Government defense policy and increases or decreases in price

had little effect on demand.[8] Normally such a situation of necessity demand would tend to permit very high pricing.

[*Overcapacity*]

The large excess capacity of the industry was a major cause of depressed prices.[9] As well as creating the possibility of price wars, the overcapacity meant that fixed costs were considerably higher than optimum. The manufacture of ammonium perchlorate was thus inefficient, and the chance for profit seriously reduced. In addition to the existing overcapacity, Hooker and Pennsalt had, in 1965 or 1966, shut down plants that could be returned to production during the early part of the damage period.

An internal study by Hooker showed that the shut down point (where it was more economical to abandon production than produce at a loss), assuming a production volume for its plant that would increase to ten or twelve million pounds a year in three to four years, would be at a price of about 19½ cents per pound. Historically Hooker's average total cost for ammonium perchlorate was about 25.8 cents per pound (Defendants' Exhibits 270, 278). The volume level hypothesized in the 19½ cents per pound shut down point would be unlikely of realization, but at a higher price Hooker would have found it advantageous to enter at a lower volume.

After careful consideration of all these factors, we conclude that the price for ammonium perchlorate would not have varied significantly during 1966 from the price levels that existed. A policy of price leadership would have taken a significant period of adjust-

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8. Presumably very drastic changes in price might eventually have an effect on demand by making alternative weapons systems more or less advantageous but, for practical purposes, demand could be regarded as independent of price.

9. The combined capacities of plaintiff's plant (20,000,000 lbs. per year) and defendants' plant (30,000,000 lbs. per year) far exceeded a demand that was generally below 20,000,000 lbs. per year during the damage period.

ment and "feeling out" of the other parties' intentions before it would be achieved. Even if a price leadership policy had existed prior to 1966 the withdrawal of Hooker and Pennsalt would have caused a period of instability and price war similar to what occurred before price leadership would have been feasible.

After 1966 we think that the prices bid on contracts would have fluctuated around a fairly narrow range with prices being quite rigid. Though normally prices would tend to vary with each year's volume assuring a stable market division, nonetheless price leadership would require fairly stable pricing to work and changes in price would lag behind changes in volume.

[*Costs*]

Before determining the actual prices, it is necessary to determine what volume levels each party would have had during the damage period in order to estimate their costs, for cost would be a major factor in determining the price levels under price leadership.

Volume

The determination of the volume which each manufacturer would have had is essentially a determination of the point where plaintiff's ability to force defendants into a price war and defendants' ability to win that price war would be in equilibrium.

[*Product Qualification*]

Defendants have introduced considerable evidence relating to the qualification of a manufacturer's ammonium perchlorate for a specific program and defendants' greater sales effort in the small volume buyer market. The implication of this evidence was that defendants had some portion of the market "locked up" and thus that portion should not be considered when dividing the market.

The evidence on qualification of ammonium perchlorate for specific programs was conflicting. There appeared to be consider-

able difference in opinion between high level rocket manufacturer executives and their field level technical people as to what tests would be required for qualification. The evidence showed that, in many programs, qualification tests would be combined with routine quality assurance tests so as to qualify another source of ammonium perchlorate at little additional expense.

Though some programs undoubtedly were "locked up" for one manufacturer or the other, the total percentage of locked up business was small compared to the whole. In general, the additional evidence reinforced our determination in the liability phase that "requisite cross elasticity of demand did exist and that PE's non-qualified A/P was in competition with Ampot's exclusively qualified A/P."

So long as programs for which only one manufacturer was and could have been qualified constitute a minority of the total market, the question of exclusive qualification is irrelevant. The market shares are principally determined by the volume and price level that would have forced plaintiff to abandon price leadership and enter into a suicidal price war. If defendants had a greater portion of the market "locked up", it only implies that plaintiff would have had to acquire a larger share of the mutually available business in order to reach the needed volume level. Only if the portion of locked up business was so large that the mutually available business was insufficient to permit plaintiff to reach needed volumes would exclusive qualification become relevant. We are satisfied that the locked up business of defendants because of exclusive possible qualification and greater sales ability was far smaller than that amount.

[*Plaintiffs' Actual Costs*]

The level of volume at which plaintiff would have been forced to abandon price leadership is largely determined by plaintiff's costs. The parties were in fierce disagreement as to plaintiff's

actual costs over the damage period. Plaintiff arrived at its cost figures by performing a detailed line-by-line analysis of each of the costs associated with the production of ammonium perchlorate and estimating by what amount those costs that varied with volume would have varied. Defendants approached the cost question by examining plaintiff's historical costs at various volume levels and extrapolating to different volume levels.[10]

The difficulty with defendants' method of analysis is that many of the plaintiff's costs varied over the damage period, but did not vary according to volume. For example, property taxes and patent amortization costs would presumably be largely independent of volume, yet they did vary markedly during the damage period (Plaintiff's Exhibit 1206). Extrapolation based in part on these varying costs would obviously be inaccurate. The difficulty becomes more acute when one includes as the basis for extrapolation years when extraordinary costs were incurred, such as 1962, plaintiff's first year of operation.

[*Estimates Prepared for Trial*]

Plaintiff's method is superior to that of defendants in approach. It lacks, however, in its execution. Because the line-by-line estimates were prepared for purposes of this trial, they are inherently suspect and that suspicion is encouraged by assumptions in Plaintiff's Exhibit 1206 that costs such as maintenance materials, truck and auto rental, professional services, travel and telephone expenses, would remain constant if volume increased substantially However, Plaintiff's Exhibit 1206 would appear to be the most accurate indicator of plaintiff's actual cost, and we shall use it as the principal basis for estimating plaintiff's costs, adding a slight amount to cover the increased cost of those figures which

10. This was done both to estimate average total cost and to estimate average variable cost by subtracting some, but not all, fixed costs.

the exhibit assumes to be fixed and which the evidence indicates would increase with volume.

[*Total Available Market*]

It is also necessary to fix, for purposes of computing damages, the total market available to be split between plaintiff and defendants. Defendants suggest in their post-trial brief that the proper criteria would be orders placed in the damage period rather than sales actually made. Defendants' position carries with it the necessary logical argument that sales made early in the damage period were the result of orders placed outside the damage period and since no antitrust violation has been shown outside the damage period, those sales cannot be regarded as other than sales made lawfully and not subject to change in estimating what the sales levels would have been absent unlawful conduct. The situation is closely analogous to that presented in *Zenith Radio Corp. v. Hazeltine Research* [1971 TRADE CASES ¶ 73,484], 401 U. S. 321 (1971), wherein the Supreme Court held that damages occurring within the damage period were recoverable even when the damages were the result of overt acts occurring outside the damage period. Thus sales made rather than orders placed will be the criteria.

Examination of the costs for plaintiff and defendants shows that, in general, plaintiff's costs are nearly equal to defendants' costs at a 40%/60% volume level (Plaintiff's Exhibits 1206). At a 35%/65% split plaintiff's costs generally exceed defendants'.[11] Since the price would normally be set at a price equal to defendants' costs, plus a small margin, and since plaintiff

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11. Extracting from the exhibits:

35%/65%	1967	1968	1969	1970
Plaintiff's costs	.237	.258	.250	.228
Defendants' costs	.206	.234	.218	.190
40%/60%	**1967**	**1968**	**1969**	**1970**
Plaintiff's costs	.221	.238	.230	.216
Defendants' costs	.211	.212	.224	.193

would follow that price with a volume that would permit him to break even, we think that the range between 30% and 40% of the market is likely for plaintiff's volume.

For the same reasons given earlier when considering price, there would not have been a significant change in volume levels in 1966 from those levels which existed.

We find that plaintiff would have sold the following volumes of ammonium perchlorate absent defendants' unlawful conduct.

1966	no change
1967	7,400,000 lbs.
1968	5,500,000 lbs.
1969	5,750,000 lbs.
1970	6,750,000 lbs.

At these volume levels we find that plaintiff would have had the following average total cost per pound:

1967	.24
1968	.26
1969	.25
1970	.23

With this division of the market and at these volume levels, we find that defendants could and would have maintained the price of ammonium perchlorate as follows:

1967	.23
1968	.23
1969	.24
1970	.25

Accordingly it becomes a matter of calculation to derive plaintiff's damages:

1967	
Plaintiff's volume	7,400,000 lbs.
Plaintiff's cost per lb.	.24
Price per lb.	.23
Net loss per lb.	.01
Net loss	$ 74,000.00
Actual loss	$592,968.00
Damages	$518,968.00
1968	
Plaintiff's volume	5,500,000 lbs.
Plaintiff's cost per lb.	.26
Price per lb.	.23
Net loss per lb.	.03
Net loss	$165,000.00
Actual loss	$498,262.00
Damages	$333,262.00
1969	
Plaintiff's volume	5,750,000 lbs.
Plaintiff's cost per lb.	.25
Price per lb.	.24
Net loss per lb.	.01
Net loss	$ 57,500.00
Actual loss	$320,281.00
Damages	$262,781.00
1970	
Plaintiff's volume	6,750,000 lbs.
Plaintiff's cost per lb.	.23
Price per lb.	.25
Net profit per lb.	.02
Net profit	$135,000.00*
Actual loss	$280,187.00
Damages	$415,187.00

*The figure of $135,000.00 is what the plaintiff should have realized as profit for 1970. It is, therefore, added to the actual loss.

Total damages before trebling $1,530,198.00

Total damages after trebling $4,590,594.00

Stock Losses

Plaintiff sold 570,644 shares of its common stock to the public in 1968 and 1969 at $1.00 per share in an unregistered public, intrastate offering in Nevada. Plaintiff sold an additional 800,000 shares of its common stock to the public in 1970 at $2.25 per share in a registered public offering.

Plaintiff contends that the prices it received for its stock were depressed because of plaintiff's poor earnings record, that plaintiff's poor earnings record was the result of defendants' antitrust violations, and that, therefore, plaintiff suffered damage equivalent to the difference between the price at which it sold its stock and the price at which its stock would have sold absent defendants' illegal conduct. The difficulty is with the conclusion of this argument. Plaintiff's chief executive officer testified that, in both stock sales, the plaintiff raised the amount of money it intended to raise (Gibson Tr. 351-352), albeit that in both cases more shares had to be sold than would have been the case absent defendants' unlawful conduct. Thus, if there were damage to plaintiff, the damage was the result of having to sell an increased number of shares.

Neither plaintiff nor defendants have cited any cases directly on point which decide the specific question of whether or not a corporation can recover for the additional numbers of shares of stock that it had to offer as the result of an antitrust violator's illegal conduct. Plaintiff has suggested that since recovery is permitted for the value of plaintiff's business as a going concern when plaintiff is driven out of business, *Continental Baking Co. v. Old Homestead Baking Co.* [1973-1 TRADE CASES ¶ 74,433], 476 F. 2d 97, 110 (10 Cir. 1973), plaintiff should be able to recover for the diminution in the value of its shares. Such an argument neglects the fact that the former going concern value of a business that has failed and the value of the shares of stock of a going business, though related, are different concepts. It also

fails to consider that the recovery of lost profits, which has been allowed in this case, serves in whole or in part to repair the loss in going concern value caused by defendants' illegal conduct.

Plaintiff also suggests that since the various shareholders suffered a loss in the value of their shares by their dilution as a result of the stock offering, and since these shareholders may not assert their claim directly, *McDaniel v. Painter,* 418 F.2d 545, 547 (10 Cir. 1969); *New Sanitary Towel Supply, Inc. v. Consolidated Laundries Corp.* [1963 TRADE CASES ¶ 70,642], 211 F. Supp. 276 (S. D. N. Y. 1962); *Kauffman v. Dreyfus Fund, Inc.* [1970 TRADE CASES ¶ 73,333], 434 F. 2d 727 (3 Cir. 1970) cert. denied 401 U. S. 974, the corporation should be entitled to sue in behalf of the stockholders for their losses as a result of the dilution of their stock. Such an argument neglects the reason why a shareholder cannot sue for losses as a result of the dilution of his stock. It is not because the corporation should sue in his behalf but rather because the amount of his damages is too remote and hypothetical to permit recovery.

> The reason for the rule against such recoveries is not so much to prevent overlapping recompense to both corporation and stockholders, but is rather to prevent the recovery for injuries which are indirect in nature. *New Sanitary Towel Supply, Inc. v. Consolidated Laundries* [1963 TRADE CASES ¶ 70,642], 211 F. Supp. 276 (S. D. N. Y. 1962).

The loss suffered by plaintiff is thus neither the loss of its value as a going concern, nor the loss to its stockholders by the dilution of their stock. The loss, if any, is the result of the fact that plaintiff's future ability to raise capital by selling stock may be impaired. Presumably the willingness of current stockholders to suffer dilution of their stock and public resistance to the purchase of the stock of a company, no matter how low the price, places a limit on the number of shares of stock that a corporation may sell. If such a limit exists, then the past sale

of stock at reduced prices would reduce the amount of capital a company can raise in the future by sale of stock.

Plaintiff has not offered any substantial convincing evidence on the extent to which plaintiff's future ability to obtain financing has been impaired. In the majority of cases, because the ability of a corporation to sell stock depends on a variety of varying, intangible, unmeasurable, and highly speculative factors, the assessment of the amount of damage by reason of the impairment would be exceedingly difficult, particularly since all of the factors affecting a corporation's ability to sell shares of stock are subject to change, and the damage to the corporation as a result of its inability to obtain financing may not occur until some date far in the future. The effect of defendants' illegal acts is only one of many factors affecting plaintiff's ability to sell its stock. We do not suggest that those injured by violation of the antitrust laws can never recover for the impairment of their ability to sell stock, but in this case we think the measure of those damages is too remote and hypothetical to permit recovery absent more convincing evidence. We are not unmindful of the rule that defendant must accept the burden of the uncertainty of the damages resulting from its unlawful conduct, *Bigelow v. RKO Radio Pictures, supra,* but in the present case plaintiff has failed to prove that any damages other than speculative damages exist beyond those compensated for by our award for lost profits.

Attorneys' Fees

Title 15 U. S. C. § 15 provides that a successful plaintiff is entitled to "the cost of the suit, including a reasonable attorneys fee." Plaintiff has submitted affidavits asserting that a reasonable attorney's fee in this action would be $845,530.75, doubled because of the risk factor involved.

That figure, before doubling, is arrived at on the basis of the following time records and rates:

Trial Attorneys and Senior Partners

R. W. Giauque	1356 hrs. at $75.00	$101,700.00
C. Keith Rooker	2685.75 hrs. at $75.00	201,431.25
C. L. Ashton	84 hrs. at $75.00	6,300.00
W. D. Hall	2112 hrs. at $75.00	158,400.00
Elliott Pollock	199.5 hrs. at $75.00	14,962.50

Experienced Attorneys and General Partners

George VandeSande	1051.75 hrs. at $60.00	$ 63,105.00
K. L. King	2620.45 hrs. at $60.00	157,227.00
Dale A. Kimball	940 hrs. at $60.00	56,400.00
Other Van Cott Attorneys	123 hrs. at $60	7,380.00
James Tassin	72 hrs. at $60.00	4,320.00
Rex E. Lee	82 hrs. at $60.00	4,920.00

Associates

R. N. Weatherbee	243 hrs. at $40.00	$ 9,720.00

Law Clerks

	91 hrs. at $25.00	$ 2,275.00

Paralegal Work

	1516 hrs. at $15.00	$ 22,740.00
	Total	$810,880.75

Estimated time to take discovery on the issue of attorneys' fees, write reply brief and attend final argument:

450 hrs. at $75.00	$ 33,750.00
150 hrs. at $60.00	9,000.00
Total fees	$845,530.75

Both parties are in agreement as to the factors to be considered by the Court in its determination of reasonable attorneys' fees. They include:

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly.

2. The likelihood, if apparent to the client, that the acceptance of a particular employment will preclude other employment by the lawyer.

3. The fee customarily charged in the locality for similar legal services.

4. The amounts involved and the results obtained.

5. The time limitations imposed by the client or by the circumstances.

6. The nature and length of the professional relationship with the client.

7. The experience, reputation and ability of the lawyer or lawyers performing the services.

8. Whether the fee is fixed or contingent.

Farmington Dowel Products v. Forster Mfg. Co. [1969 TRADE CASES ¶ 72,738], 297 F. Supp. 924 (D. Me. 1969), reversed [1970 TRADE CASES ¶ 73,075], 421 F. 2d 61 (1 Cir. 1970), and cases cited therein; *TransWorld Airlines v. Hughes* [1970 TRADE CASES ¶ 73,142], 312 F. Supp. 478 (S. D. N. Y. 1970), aff'd as to attorneys' fees [1971 TRADE CASES ¶ 73,690], 449 F. 2d 51 (2 Cir. 1971).

Though perhaps included in the fourth and seventh factors, the skill with which counsel represents his client is a factor that should be emphasized over the experience, reputation and ability of counsel, the performance being more important than the reputation for performance.

Defendants object to the amount requested by plaintiffs on two grounds. First, defendants assert that a considerable portion of the time spent by plaintiff's counsel is not compensable because excessive or because expended on noncompensable claims or theories. Secondly, defendants state that the fees requested, if awarded, would be in violation of the Canons of Ethics as excessive and that this Court has the inherent power to reduce such an excessive award.

[*Time Spent on Other Claims*]

Under the first argument, defendants suggest that plaintiff should not recover for time spent on plaintiff's unsuccessful claims

under the Utah Unfair Practices Act, the defense of counterclaims raised by defendants, or the time spent on plaintiff's theory of recovery for the lessened value of stock sold by plaintiff.

The counterclaims in this case were so closely interwoven with plaintiff's claim that the allowance of attorneys' fees should properly be considered for the time spent on the counterclaims, *Trans-World Airlines v. Hughes, supra, Cackling Acres, Inc. v. Olson Farms, Inc.* (D. Utah, August 20, 1974, Case No. D-29627). In regard, however, to the Utah Unfair Practices Act, we think no award can be made. It is difficult for us to perceive how plaintiff can recover, under a federal statute providing for attorneys' fees for successful claims under the federal antitrust statutes, attorneys' fees for an unsuccessful claim under a state antitrust law. It is, of course, difficult to segregate that portion of the attorneys' fees attributable solely to the claim under the state law since the bases for the federal and state claims largely overlap.

[*Stock Damage Claims*]

Though unsuccessful, plaintiff is entitled to attorneys' fees for the time spent on the stock damage theory. Though novel, the claim is not spurious, and to disallow the time spent because this damage theory was not accepted by the Court would logically require us to disallow the time spent by plaintiff in attempting to prove all of the theories and facts that would have led to a higher award than that which we have made.

Defendants also suggest that plaintiff should not recover for the time spent on the claims for injunctive relief. Since the basis for these claims was the same as for the claims for damages, the amount of time spent on these claims is minimal, but will be excluded, *TransWorld Airlines, Inc. v. Hughes, supra.*

In addition, a minimal amount of time was spent by counsel on an unfair trade count, which was essentially abandoned early in the proceedings. This time will also be excluded.

[*Paralegals*]

Defendants also argue that recovery should not be allowed for work done by paralegals and law clerks. The decisions are split on this point. Compare, *TransWorld Airlines, Inc. v. Hughes, supra, Cackling Acres Farms, Inc. v. Olson Farms, Inc., supra,* with *Pacific Coast Agricultural Export Assoc. v. Sunkist Growers,* 1973-1 TRADE CASES (CCH) [¶ 74,523] at p. 94,345 (N.D. Cal. 1973). The policy arguments on both sides of this question are meritorious. It would promote inefficiency in the providing of legal services to refuse compensation for legal work that could be effectively done by a non-attorney and thereby encourage the inefficient use of skilled attorneys. On the other hand, to compensate a "paralegal" for the time spent on the case would invite the compensation of secretaries, accountants, clerks and others who may provide services to the attorney.

We are, however, construing statutory language and the statutory language in this case is quite clear. It refers to "the costs of the suit, including a reasonable attorney's fee." The "costs of the suit" has been uniformly interpreted to mean the costs that may be awarded under Rule 54 of the Federal Rules of Civil Procedure. *Twentieth Century Fox Film Corp. v. Goldwyn* [1964 TRADE CASES ¶ 71,010], 328 F. 2d 190 (9 Cir. 1964), cert. denied, 379 U. S. 880. Paralegal fees would not be one of these costs. Nor can paralegal fees or law clerks' fees be considered "attorneys' fees."

[*Overhead*]

Such a result is not as harsh as it may seem since paralegal fees may be considered a part of the overhead of the attorney and thus a factor in his hourly rate just as his secretary's salary is an element in the hourly rate.

Defendants also submit that the time spent on certain aspects of this case was excessive. We cannot agree with the proposition

that the case has been either overprepared or overtried. The case has been both complex and difficult and plaintiff's counsel—in part through the preparation of various summaries of evidence—has contributed to the Court's comprehension of the case. Though certainly some of the testimony and evidence produced was superfluous, any complex case will have evidence and testimony that the Court will regard as repetitive and superabundant, and the superfluous evidence and testimony in this case was neither excessive in quantity nor obviously irrelevant.

The efforts of Washington counsel in this case have largely been hidden from the Court. Though the arrangement between plaintiff's two firms specifies that Mr. Hall of Moore and Hall would be chief counsel in the case, he has not apparently exercised that leadership in the courtroom or conferences in which the Court has participated, though he may well have exercised it outside of the Court's view. Without expressing any opinion as to the contribution of each attorney, we think that there must necessarily be one lead counsel in a case who would be entitled to a higher hourly rate than other counsel. Though counsel may divide that leadership as they see fit, it would be unreasonable to pay three attorneys the premium that should attach to one.

Moreover, we are troubled by the inclusion in certain of the time records of most or all the time spent on Pacific Engineering Company's account, when it appears probable that at least some of that time was devoted to matters other than this suit.

Considering all of these factors, and the testimony of Mr. Billings and Mr. Berman as to rates in the Salt Lake City area,[12]

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12. In arriving at an hourly rate figure, we have made allowance for the fact that this litigation has spanned several years and the rates would presumably have been lower at the inception of the case than they are presently.

we think the following provides the proper basis for the reasonable award of attorneys' fees:

Lead counsel	
2,500 hrs. at $75.00	$187,500.00
Trial attorneys and senior partners	
3,500 hrs. at $50.00	175,000.00
Experienced attorneys and general partners	
4,000 hrs. at $40.00	160,000.00
Associates	
200 hrs. at $30.00	6,000.00
Total	$528,500.00

The remaining question is whether or not it is appropriate to include a "risk" factor which would increase this award. Though it is clear that a risk factor is appropriate in class action cases, plaintiffs have cited no nonclass action case where a risk factor has been used, nor has it generally been listed as a factor to be considered. It would not be proper to extend a statute awarding attorneys' fees to the successful litigant so as to compensate the litigant for the possibility of failure as well as the reality of success.

We think the award to plaintiff's counsel of fees in the neighborhood of one-third of the single damage award is neither excessive nor unreasonable. We do not have before us the consideration of plaintiff's private 40% contingent fee arrangement with counsel.

Costs

Counsel have requested a determination of costs prior to entry of final judgment. The plaintiff has substantially prevailed but a few items require comment.

In general, 28 U.S.C. § 1920 is the controlling statute, coupled with the exercise of sound discretion on the part of the Court. *Utah v. United States,* 304 F. 2d 23, 27 (10 Cir.), cert. denied, 371 U.S. 826 (1962). The discretion should be sparingly exercised in the absence of statute. *Farmer v. Arabian American Oil Co.,* 379 U.S. 227, 235 (1964).

Plaintiff submitted a Bill of Costs aggregating $13,017.38, which did not include the reporter's cost of transcribing the brief testimony on attorneys' fees and the final argument on June 16, 1975. Plaintiff's cost expended for the transcribing of the original and one copy of the hearing on June 16, 1975, should be added to the determination by the Court.

Items such as fees of the clerk ($15.00), fees of the marshal ($13.00), and docket fees under 28 U.S.C. § 1923 are not in dispute. Presumably they have been correctly computed.

(a) *Fees of Court Reporters*

No *extra* copy of the various transcripts was supplied for the use of the Court. The reporter provided and charged the original for court use; the so-called *extra* copy was the statutory "free" copy required under 28 U. S. C. § 753(f) for which no charge was made. It was not appropriate for the Court to use the statutory "free" copy as the judge-designate was from a distant area and the potential loss of the original by mail was distinct.

Plaintiff is, therefore, entitled to the amounts expended for the costs of the original transcripts provided. Daily transcripts were provided for the liability and damage trials.

Plaintiff's cost for one copy of the liability and damages transcripts should also be allowed, *assuming that the cost of only one copy was included.* There would be little or no need for a daily transcript if counsel and the Court did not each have a copy available during the course of the continued hearings. Such transcripts were "necessarily obtained for use in the case." 28 U. S. C. § 1920.

With one exception the Court is not convinced that counsel's copy of the various pre-trial proceedings should be taxed as a part of the costs. That exception is the hearing on May 4, 1973, where exhibits were introduced and defendant moved to amend its previously asserted position on the relevant market; all of which was

essentially a part of the trial which actually commenced on the following Monday. The cost of the originals for the use of the Court is allowed. While the copy for counsel is a distinct convenience, it is not necessarily obtained for use in the case. The statutory free copy was always available in the office of the clerk.

(b) *Deposition Cost*

Approximately 31 depositions were taken at the instance of the parties. There is no available breakdown of the cost of the original versus the cost of the copy. Plaintiff claims a total expenditure of $3795.60, including one post-liability trial deposition taken by leave of Court. Many of the depositions were summarized at the direction of the Court. The cost of the original and one copy of the post-trial deposition of Fred D. Gibson, Jr. is allowed. As to the witnesses who appeared and testified at the trial, no allowance will be made for the origial or copy of their depositions. While it is true that occasional reference was made to pretrial deposition testimony, the essential or kindred purpose was for thorough preparation by way of discovery. 6 *Moore's Federal Practice*, ¶ 54.77(4), p. 1723.

As to depositions which were introduced into evidence involving witnesses who did not testify at the actual trials, the Court will allow the taxation of the cost of the original and one copy. *Sperry Rand Corp. v. A-T-O, Inc.*, 58 F. R. D. 132 E. D. Va. 1973). These depositions were introduced without objection.

Counsel will review the depositions taken and advise the clerk as to the category into which each deposition falls, together with the amount if allowed under the above ruling.

(c) *Witnesses' Mileage and Attendance Fees*

As to the attendance fees and mileage for Fred D. Gibson, Jr., it is the view of the Court that this should not be allowed. He is the principal officer of the plaintiff corporation but is not a party to the action. His presence during all stages of the trial was more

than a natural concern of a corporate officer. As a founder and substantial stockholder he has devoted the greater portion of his life to the plaintiff corporation. While there is authority to the contrary, the rule as applied to Gibson should treat him to the same degree as though he were the plaintiff. 57 A. L. R. 2d 1243, 1245. A party generally may not recover costs for travel in connection with his own appearance as a witness, *Katz v. Cie Generale Transatlantique,* 190 F. Supp. 435 (E. D. Va. 1960).

Local Rule 16(e), as adopted by Judge Christensen to whom this case was originally assigned, provides for the taxation of costs only to the extent of 100 miles for witnesses traveling in excess thereof to testify at the trial. While *Farmer v. Arabian American Co., supra,* does vest discretion in the district court to allow excess mileage, the Court would prefer following the local rule in the absence of a compelling showing as to the necessity for actual appearance at the trial as contrasted with the taking of a deposition. True, several of the witnesses for whom the excess is claimed were experts but this fact, standing alone, does not mandate a departure from the local rule. Defendants take no exception in its brief to the claimed attendance fees for witnesses other than Gibson, and these items will be allowed.

(d) *Fees for Copying*

The final item is a requested allowance of ten cents per sheet for 10,600 pages of documents. This is broken down as follows:

3800—Plaintiff's trial exhibits (Court's copy)
3800—Defendants' copy of plaintiff's trial exhibits
1500—Evidence books (Court's copy)
1500—Evidence books (defendants' copy)

The statute, 28 U. S. C. § 1920, does provide for taxation of "fees for exemplification and copies of papers necessarily obtained for use in the case." Again, as to the necessity for providing the

Court with copies of these exhibits, it is proper to make this allowance by reason of the possible loss in the mail, the designated judge not maintaining his quarters in proximity to the courthouse where the original exhibits were stored. It follows without argument that plaintiff was required to supply defendants' counsel with copies of these exhibits.

Plaintiff also claims reimbursement at the rate of ten cents per sheet for "Evidence Books" especially prepared for final argument. While this may have been of convenience to the Court and counsel by reason of the vast number of exhibits, it was, in the opinion of the Court, a luxury item which should not be allowed.

Defendants' brief states that the parties had agreed to exchange trial documents "without expense." If this is the true agreement, and it was clearly stated that no taxable costs would be claimed for defendants' copies, it would fall outside of the statute and could not be claimed as to the 3800 sheets provided the defendants.

Conclusion

Counsel for plaintiff will prepare for entry a final judgment in accordance with the rulings made herein. An opportunity for inspection and discussion on the part of defendants' counsel shall be afforded prior to presentation to the Court. If there is agreement on the wording of the judgment order, local counsel shall endorse the order as "Seen" which will indicate that no further hearing is required. The endorsement by local counsel for any of the parties will not reflect any agreement with the Court's rulings.

[¶ 60,737] Pacific Engineering & Production Co. of Nevada v. Kerr-McGee Corp. and Kerr-McGee Chemical Corp.

U.S. District Court, District of Utah, Central Division. Civil action No. C-40-70. Dated February 17, 1976.

Private Enforcement and Procedure—Proving Damages—Corrected Damage Figures—Monopoly Victim's Costs—Prices of Product.—Correction of errors in damage figures resulted in a $462,975 reduction in treble damages recoverable by a monopoly victim in the ammonium perchlorate industry. Additionally, an increase in the calculation of the victim's costs, after an adjustment based upon direct variable costs, was denied, and an increase in the calculation for prices of the product, in view of the monopolizer's forward pricing and a university research study, also was denied. See ¶ 9302.

Correcting and supplementing 1976-1 Trade Cases ¶ 60,724.

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Supplemental Memorandum and Order

HOFFMAN, D. J.: Prior to the entry of a final judgment order presented in accordance with the Court's Memorandum Opinion Dated January 29, 1976, defendants, quite properly, called to the attention of the Court and opposing counsel certain obvious errors appearing on pages 21 and 21-a of the Memorandum Opinion. These obvious errors were occasioned by transposing certain figures from Plaintiff's Exhibit 1207, errors with respect to years involved and actual losses being confused with the total damage claim of plaintiff. These errors may be more appropriately corrected by substituting new pages 21 and 21-a.

It is therefore Ordered that the Clerk substitute the attached new pages 21 and 21-a in the Memorandum Opinion dated January 29, 1976, and the Clerk will thereupon attach the pages so substituted to this Supplemental Memorandum and Order, all of which will be done by the Clerk prior to the docketing of the final judgment herein [corrected figures incorporated in memorandum opinion, 1976-1 TRADE CASES ¶ 60,724.—CCH].

The Court apologizes to counsel for these errors and regrets the inconvenience occasioned thereby. At the hearing on February 10, 1976, the reason for the errors was explained to counsel but the Court must accept the full responsibility.

I

The admitted errors have been corrected and no further reference to same will be made. The reduction in total damages before trebling is $154,325.00 and, after trebling, is $462,975.00.

II

[*Cost Per Pound*]

Defendants also take exception to the Court's determination of the cost per pound for 1967, 1968, 1969, and 1970. It will be noted that the Court, in fixing the plaintiff's cost per pound, generally rounded off the figures appearing in Plaintiff's Exhibit 1207 as follows:

	As per exhibit	Court finding
1967	.2367	.24
1968	.2584	.26
1969	.2502	.25
1970	.2281	.23

The "rounding off" process resulted in a benefit to defendants for 1967, 1968, and 1970, but operated to defendants' detriment for 1969.

On page 19 of the Memorandum Opinion the Court pointed out that plaintiff's expert had assumed certain cost items would remain constant even if the volume increased substantially. The cost items specifically mentioned on Plaintiff's Exhibit 1206 were maintenance materials, truck and auto rental, professional services, travel and telephone and telegraph expense. These items are not in the true sense directly variable; nor may they be characterized as fixed. In oral argument on February 10, 1974, the Court described them as "semi-fixed" and "semi-variable."

Available to the Court were the fixed costs determined by plaintiff's expert, Caldwell, and the variable costs computed by defendants' expert, Campbell. There was no "in-between" evidence upon which the Court could make a finding.

[*Direct Variable Costs*]

Defendants now compute plaintiff's costs per pound, after adjustment based upon direct variable costs, as follows:

	Adjusted cost	Court finding
1967	.2530	.24
1968	.2781	.26
1969	.2524	.25
1970	.2437	.23

It is, of course, axiomatic from the formula adopted by the Court that the greater plaintiff's cost will result in a reduction the total damage. During the year 1969, the principal focus of defendants' attack on plaintiff's cost as determined by the Court, the differential is only .0024 computed on direct variable cost method. The adjustment for that year would be minimal due largely to the fact that the Court increased plaintiff's potential sales by only approximately 600,000 pounds of A/P.

The fallacy in using the direct variable method is demonstrated by a comparison of the item of "professional services." In 1969

plaintiff expended $6016.00. In 1970 this item was increased to $48,034.00 due principally to the registered public stock offering in that particular year. It follows that the direct variable cost as reflected by that particular item is not in line with the normal or customary cost for "professional services" as evidenced by other years; 1967—$33,766.00 and 1968—$4,538.00. Other items among the five involved likewise to a degree variable, although it stands to reason that a large proportion of the cost remained fixed.

On page 2 of the Memorandum Opinion we called attention to the leading case of *Bigelow v. RKO Radio Pictures* [1946-1947 TRADE CASES ¶ 57,445], 327 U. S. 251, 265 (1946), where the Supreme Court said that the "most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created" and "the wrongdoer may not object to the plaintiff's reasonable estimate of the cause of injury and of its amount, supported by the evidence, because not based on more accurate data which the wrongdoer's misconduct has rendered unavailable." Cited with approval in *Bigelow* is *Sheldon v. Metro-Goldwyn Corp.*, 309 U. S. 390, 406 (1940), a copyright infringement case, which states, "Where there is a commingling of gains, he [the wrongdoer] must abide the consequences unless he can make a separation of the profits so as to assure to the injured party all that justly belongs to him." In *Sheldon* the lower court did not accept the experts' testimony "at its face value" and the Supreme Court held that the wrongdoers were "not in a position to complain that the amount thus allowed by the court was greater than the expert evidence warranted," and further pointed out "that what is required is not mathematical exactness but only a reasonable approximation."

We feel that the evidence, taken as a whole, reasonably justifies the findings of cost per pound for the product and the defendants' post opinion motion to alter the findings is *overruled.*

III

[*Prices*]

Plaintiff complains as to the prices found by the Court as follows:

1967	.23
1968	.23
1969	.24
1970	.25

It is fundamental that the higher the price found, the greater plaintiff's damages will be.

Plaintiff points to the price found for 1968 and urges that defendants' forward pricing and the Stanford Research study demonstrated a price in the .25 range for 1968. In short, plaintiff contends that defendants have not met the burden imposed upon them by *Bigelow*.

These factors were not overlooked but again we point to *Sheldon* which suggests that mathematical exactness is not required and only a reasonable approximation is expected. The price, as defendants argue, was determined primarily by defendants' costs, the Government defense policy and excess capacity. In fact, defendants contend that the prices determined by the Court should have been even lower.

We find no merit to plaintiff's position here asserted and its post opinion motion to alter the findings is overruled.

It is so Ordered.